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Asiya Vs. Hameed

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Court : Kerala

Decided On : Mar-31-2009

Reported in : AIR2009Ker163

Judge : P.R. Raman and; C.T. Ravikumar, JJ.

Acts : Evidence Act, 1872 - Sections 4, 12 and 112

Appeal No. : M.F.A. No. 2 of 2002

Appellant : Asiya

Respondent : Hameed

Advocate for Def. : B.S. Swathy Kumar, Adv.

Advocate for Pet/Ap. : Babu Karukapadath and; M.A. Vaheeda Babu, Advs.

Disposition : Appeal dismissed

Judgement :

C.T. Ravikumar, J.

1. The appellant herein was the respondent and the respondent herein was the petitioner in O.P. No. 236 of 2000 on the file of the Family Court. Manjeri. The subject matter of the controversy in this appeal is regarding the parentage of one Irfana Thasni, the daughter born to the appellant.

2. The facts of the case, in succinct, are as follows:

The appellant and the respondent belong to Muslim community. Their marriage was solemnised on 2-4-1986. Their first child faced instantaneous death on delivery and then two more children were born in their wedlock. In the year 1996, the respondent/petitioner went to Saudi Arabia to fend for himself and his family. He came back to his native place in May, 1996 and again went back to Saudi Arabia in September, 1996. However, bitter experiences were in store for him there and also at home. While working at Saudi Arabia, the appellant was arrested for working without the required documents. His Passport was impounded by the police and he was detained in prison at Jidda. The Indian Embassy intervened in the matter and a temporary Passport was arranged for him and he was sent back to India in May, 1997. Thereafter, on his arrival at Bombay on 6-5-1997, his temporary Passport was also impounded and he had to remain at Bombay for 20 more days. On 28-5-1997, he reached home. At that time, the appellant/respondent was in her paternal home and she refused to join the respondent at his residence citing inguinal pain and she continued to keep aloof from him. On 14-7-1997, he made one last ditch effort to get her back home and for that purpose he along with his brother Moidutty and some other relatives went to the house of the appellant. The appellant then appeared frail and foggy and the reason for her feigning illness and fiddling was revealed when she was taken to the doctor who advised to get her admitted in a hospital immediately for delivery. Feeling dejected and frayed over her infidelity, the respondent/petitioner left from there and took the other two children along with him. In the hospital, the appellant/respondent gave birth to Irfana Thasni, the unfortunate child whose paternity is in dispute. According to the respondent/petitioner, he left for Bombay enroute to, Saudi Arabia on 10-9-1996 and he reached there on 13-9-1996. He had obtained permission to reside there on 1-10-1996. His arrest and the subsequent developments, as stated above, occurred thereafter. In short, according to the respondent/petitioner, the delivery of the child Irfana Thasni was on the 307th day since his departure to Bombay on 10-9-1996 and that during the said period, they had absolutely no access to each other. It was, with the said averments and allegations that the respondent/petitioner had approached the Family Court for a declaration that he is riot the father of the child Irfana Thasni

born to the appellant/respondent on 14-7-1997.

3. The appellant/resppndent filed a counter affidavit stoutly reefing all the allegations and averments in the petition. According to her, four children, including Irfana Thasni, were born in her wedlock with the respondent/petitioner, She admitted that the respondent/petitioner had been abroad and that he returned to the native place during May, 1996. However, it is pertinent to note that in the counter affidavit she had denied the averments that he had gone back to Saudi Arabia |n September, 1996, that he was arrested by Jidda police and detained in prison-during May, 1997 and that he was sent back to India in May, 1997 on the strength of a temporary Passport. She had specifically denied the averment regarding non access and ascertained that she was residing with the respondent in his house till she was taken to the Medical College Hospital, Malappuram for delivery of Irfana Thasni. She, however, contended that the Original Petition was filed solely with the intention to avoid payment of maintenance to herself and the said child Irfana. After a careful consideration of the contentions on either side, the Family Court formulated the following points:

(i) Whether the petitioner and the respond dent had access to each other at the time when the female child born to the respondent on 14-7-1997 would have been conceived?

(ii) Whether the petitioner is the father of the child born to the respondent on 14-7-1997?

4. The evidence in this case consists of the oral testimonies of PWs. 1 to 5 and RW. 1 and documentary evidence Exts. Al to A7. After a careful appreciation of the oral and documentary evidence, the Family Court allowed the Original Petition and granted a decree declaring that the respondent/petitioner is not the father of the child Irfana Thasni born to the appellant/respondent on 14-7-1997. It is the said judgment and decree dated 31-10-2001 of the Family Court, Manjeri in O.P. No. 236 of 2000 that is under challenge in this appeal.

5. Certain admitted facts are deducible from the pleadings on either side. The factum of marriage between the appellant and the respondent, its subsistence and

the birth of Irfana Thasni, the child, whose paternity is in question, during the subsistence of the marriage are admitted facts. The substratum of the submissions of the learned Counsel for the appellant is that in the light of the aforesaid admitted facts, the Family Court should not have allowed the respondent/petitioner to adduce evidence to disprove the presumption of legitimacy of the child Irfana Thasni, in view of Sections 4 and 112 of the Indian Evidence Act. 1872 (hereinafter referred for brevity as 'the Act'). In other words 1 according to counsel for the appellant, the said Sections of the Act create an absolute bar to disprove the presumption of legitimacy of a child born during the subsistence of a Valid marriage rather, preclude any evidence in rebut of. Before going into the factual aspects in this case, we may firstly deal with the legal aspects involved in this matter. For a proper and profitable understanding of the case, it is better to extract the relevant provisions under Sections 4 and 112 of the Act. Section 4 of the Act defines conclusive proof as hereunder:

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.

Section 12 of the Act reads as follows:

Birth during marriage conclusive proof of legitimacy:-- 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 other 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.

Section 4 of the Act maintains clear distinction between the words 'may presume', 'shall presume' and 'conclusive proof'. Learned Counsel for the appellant contended that the presumptions contemplated under the definitions of the words 'may presume' and 'shall presume' are rebuttable and the position is totally different when the words 'conclusive proof are used. According to the counsel, the definition of the words 'conclusive proof' in Section 4 of the Act contemplates irrebuttable presumptions. Of course, a perusal of Section 112 of the Act would

reveal that the words 'conclusive proof are used in the said Section. As per Section 112 of the Act, if birth of a child takes place during the subsistence of a valid marriage between his mother and any man or within 280 days after its dissolution and the mother remaining unmarried, it shall be the conclusive proof that the said child is the legitimate child of the said man and evidence to disprove the said legitimacy cannot be permitted by the Court, contends counsel for the appellant.

6. To buttress the said contention, learned Counsel for the appellant relied on a catena of decisions. Vasu v. Santha reported in 1975 KLT 533, Kesavan v. Krishnamma reported in 1981 KLTSN 75 (Case No. 137), Mathew v. Annamma Mathew reported in 1993 (2) KLT 1016 : 1995 AIHC 351, P. Rajeevan v. Kalliani and Ors. reported In 1998 (2) Kar LJ 522 and Sajitha v. State of Kerala reported in 2002 (3) KLT 762 are some of the decisions so cited. In fact, a close scrutiny of the said decisions would go to show that they do not help the appellant to bring home the aforesaid points. None of the said decision laid down the proposition that the presumption raised under Section 112 of the Act is rebuttable in all situations. In the decision in Vasu v. Santha reported in 1975 KLT 533, it has been held as follows:

The appellant admits that respondents 2 and 3 were born during the subsistence of his marriage with the 1st respondent. So, under Section 112 of the Evidence Act this fact is conclusive proof that they are his legitimate children unless he can show that he had no access to the 1st respondent at any time when they could have been begotten. In other words, this conclusive presumption of law can be displaced only by proof of the particular fact mentioned in the Section. namely, non-access between the parties to -the marriage at a time when according to the ordinary course of nature, he could have been the father of the children.

(Emphasis supplied)

In the decision in Kesavan v. Krishnarnma reported in 1981 KLTSN 75 (Case No. 137), it has been held thus:

Law, particularly law in India, leans in favour of presumption of legitimacy of a child born in lawful wed-lock. This principle finds statutory recognition in Section 112 of the Evidence Act... It is well established that this presumption can be rebutted only in the manner contemplated by Section 112, namely, by proof of non-access for the spouse at any time, when, the child could have been conceived.

(Emphasis supplied)

In Mathew v. Annamma Mathew 1993 (2) KLT 1016 : 1995 AIHC 351, it is held as follows:. 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 begotten.

(Emphasis supplied)

In the decision in P. Rajeevan v. Kalliani and Ors. 1998 (2) KLJ 522, this Court held as follows:

The first limb of Section 112 is conspicuously clear that when the child was born during the continuance of the valid marriage of his parents, it is a conclusive proof that the child is a legitimate one. Even after the dissolution of the marriage between the parents of the child, if the child is born within 280 days from the dissolution of the marriage, it is also conclusive proof that it is a legitimate child born to the parents. The party who is questioning the legitimacy of the child has to positively establish that the spouses had no access to each other at any time when the child would have been begotten....

In the decision reported in Sajitha v. State of Kerala 2002 (3) KLT 762, this Court held thus:. To dispel the presumption arising under Section 112 of the Evidence Act requires that a party disputing the paternity to prove non-access....

(Emphasis supplied)

7. Thus, it is very much obvious that in all the decisions mentioned supra, it has been categorically held that the presumption of legitimacy of a child contemplated under Section 112 of the Act can be displaced in the manner provided under the said section itself. In other words, the said presumption under Section 112 of the Act regarding legitimacy of a child is a conclusive proof subject to the right of the party disputing the parentage proves non access.

8. A scrupulous scanning Of Section 112 of the Act would show that it contemplates twin presumptions, one rebuttable and the other irrebuttable. It contemplates the rebuttable presumption of legitimacy of a child born during the subsistence of a valid marriage between his mother and any man or within 280 days after its dissolution and the mother remaining unmarried. The section enables, rather permits, the party disputing the parentage of the child to rebut the presumption contemplated under the said section regarding the parentage of the child by proving non-access of that man to his mother at any time when the child in question could have been begotten. When, once the party disputing the paternity, fails to prove such non-access, the aforesaid rebuttable presumption becomes irrebuttable presumption of law and would conclusively prove the legitimacy of the child. Section 112 of the Act is founded on the salutary maxim 'pateris est quern nuptiae demonstrant' (He is the father whom nuptials show to be so or the marriage indicates). This presumption is essential to ensure the social fabric of the society and, therefore, the said presumption cannot be permitted to be rebutted lightly. The Legislature, has, therefore, chosen to permit rebuttal of the said presumption solely on account of 'non-access' during the period the child in question could have been begotten and not in any other manner.

9. It has been held in various decisions that the words 'access' and 'non-access' used in relation to Section 112 of the Act only connote existence of opportunities for coitus. Learned Counsel for the appellant has also attempted to canvass the position that the words 'conclusive proof in Section 112 of the Act preclude any evidence in rebuttal in the light of the definition 'conclusive proof given under Section 4 of the Act as otherwise there would be antithesis between the said two sections. It is true that when one fact is declared to be conclusive proof of another or proof of the one fact the other has to be regarded as proved and thereafter,

there cannot be any question of rebuttal of the said conclusive proof. In such situations, it is impermissible to allow evidence to be given for the purpose of disproving the one fact. It is in this context that the learned Counsel for the appellant sought to canvass the position that granting permission to rebut the presumption of legitimacy of a child contemplated under Section 112 of the Act would not create antithesis between Section 112 of the Act and the definition of conclusive proof under Section 4 of the Act. However, a proper understanding of Section 112 of the Act would show the absolute absence of any such antithesis between the said two provisions of law, As stated earlier, going by the very provision under Section 112 of the Act, the said section contemplates twin presumptions and the presumption of legitimacy of a child born during the subsistence of a valid marriage between his mother and any man or within 280 days of its dissolution and the mother remaining unmarried, can be rebutted by establishing non-access between the parties to the marriage. Failure to prove non-access by the parry disputing the paternity or not raising the ground of non-access alone would make the said rebuttable presumption of legitimacy of the child contemplated under Section 112 of the Act an irfebuttable one and then and then only the said presumption becomes conclusive proof regarding the legitimacy of the said child in question. According to us, the syntax of the section especially the last clause viz., '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' leads only to the said irresistible conclusion. When once presumption contemplated under Section 112 of the Act becomes such a conclusive proof, it is impermissible to allow evidence to be adduced for the purpose of disproving it. Thus, it is evident that there is absolutely no antithesis between Section 112 of the Act and the definition of conclusive proof in Section 4 of the Act.

10. The above discussions on Section 112 of the Act and the decisions relied on by the appellant would lead us to the conclusion that the presumption of legitimacy of a child contemplated under Section 112 of the Act is rebuttable, but rebuttable only on the ground of non-access. Therefore, the contention of the appellant on the contrary is liable to fail.

11. Now, the question is whether the respondent/petitioner in this case who disputed the paternity of the child Irfana Thasni born to the appellant/respondent on 14-7-1997 has succeeded in proving non-access. As already stated, access or non-access connotes the existence of opportunities for coitus. Non-access can be established by direct evidence of positive nature or even by circumstantial evidence of cogent and conclusive nature. Now, we may have to look into the factual aspects of this case. The respondent/petitioner contended that the child Irfana Thasni was born to the appellant on the 307th day since his departure to Bombay enroute to Saudi Arabia. His specific case is that from Malappuram he left for Bombay on 10-9-1996 by bus belonging to Akbar Travels of India and that he reached Saudi Arabia on 13-9-1996. It is his further case that thereafter he returned to his native place and reached home only on 28-5-1997. As mentioned earlier, the said contentions of the respondent/petitioner were refuted by the appellant/respondent. Both the appellant and the respondent mounted the box during trial to give evidence as RW. 1 and PW.1 respectively. To prove the said facts as also the bitter experiences faced by him during the period between 10-9-1996 and 28-5-1997, he had also examined one Moidutry, as PW.2, one Dr. Abdul Majeed as PW. 3, one Musthafa M.P. as PW. 4 and one Nabeel Babu as PW. 5. He had also produced and marked the Boarding Pass issued from Akbar Travels of India as Ex. Al, permission (Ikama) from Saudi Arabia as Ext. A2, the English translation of pages 3 and 4 of Ikama (Ext. A2) as Ext. A2(a), document issued as prqof of Emergency Passport from Sahar Airport, Bombay as Ext. A3, certificate of birth of Irfana Thasni as Ext. A4, extract of case sheet from M. B. Hospital as Ext. A5, permission letter issued to travel in Saudi Arabia as Ext. A6 and post cover of the letter sent by him to his brother (Moidutry) as Ext. A7. A scanning of the evidence of the respondent/petitioner as PW. 1 would make it absolutely clear that he had deposed in Court perfectly in consistent with his pleadings in the original Petition. However, the appellant/respondent as RW. 1 virtually admitted the case of the respondent/petitioner in the her oral testimony. Though she had refuted the specific case of the respondent regarding his leaving for Saudi Arabia and his subsequent, return to the native place, in the counter affidavit, she admitted the said facts in unambiguous terms. In the chief examination, she has deposed as follows:

(Vernacular matter omitted....Ed.)

During cross-examination, she had deposed as hereunder:

(Vernacular matter omitted....Ed.)

It is thus evident that the oral testimony of RW. 1 virtually corroborates the testimony of PW. 1 on the crucial and material points. The respondent/petitioner deposed that he had left for Bombay enroute to Saudi Arabia on 10-9-1996. During cross-examination, the appellant/respondent who was examined as RW. 1 had admitted that the respondent/petitioner had left for Bombay by bus in September, 1996. Her deposition during the chief examination, as extracted above, corroborates the case of the respondent/petitioner that he came back to his native place only on 28-5-1997. Thus, it would go to show that there is no dispute on the aforesaid crucial and material aspects and that the case of the respondent/petitioner has virtually been admitted by the appellant. There cannot be any doubt that the facts admitted need not be proved in evidence. However, we may examine the evidence adduced by the respondent/petitioner, oral and documentary, to substantiate his case.

12. As PW. 1, the respondent/petitioner had deposed that he left for Bombay by bus from Malappuram on 10-9-1996. Ext. Al is the boarding pass dated 10-9-1996 issued by Akbar Travels of India and the same is proved by PW. 5, the Manager of the said Travels. PW. 5. had deposed that Ext. Al was issued by Akbar Travels. A scanning of the oral testimony of PW. 5 would reveal that the appellant/respondent could not extract anything from him so as to discredit or disbelieve his evidence. In fact.the evidence of PW.l (respondent/petitioner), RW.l (appellant/respondent), PW. 5 and the documentary evidence Ext. Al would make the case Of the respondent/petitioner cogent and conclusive in regard to the aforesaid aspect. The respondent/petitioner had deposed that he had reached Saudi Arabia on 13-9-1996 and sought permission for residing in that country. According to him, he obtained permission on 1-10-1996. Ext. A2 is the permission (Ikama) issued to him and the same is in Arabic language. Ext. A2(a) is the English translation of pages 3 and 4 of Ext. A2. He had also deposed that he was arrested by the police of Saudi Arabia during April, 1997 on the ground that he was not in possession of

sufficient documents to work in that country. His Passport was impounded and subsequently he was detained in prison at Jidda. He further deposed that the Indian Embassy had intervened in the matter and he was issued an emergency Passport on the strength of which he reached Bombay on 6-5-1997. He had further deposed that on his arrival at Bombay, his emergency Passport was impounded by the police and he had to remain in Bombay for 20 days more before reaching home on 28-5-1997. This, according to him, was on account of the fact that he had no money to reach his native place from Bombay. PW.4 is the witness who translated pages 3 and 4 of Ext. A2 which translation was marked as Ext. A2(a). According to PW.4, he has passed M. A. and B. Ed. and had worked as an Arabic Translator. He had deposed that, the translation has been done c0rrectly."The translation shows that the permit was issued on Hijra dated 18-5-1417 and the date of expiry is 7-5-1418. It is seen that the said dates correspond to the dates of the Christian era referred to by the respondent/petitioner in his petition as also during deposition. Ext. A3 corroborates the version of the respondent/petitioner that he came back to India only in May, 1997 and the same also reveals the fact that the temporary Passport issued to the respondent/petitioner from Jida on 26-4-1997 was impounded by the Bombay police emigration. As already stated, the respondent/petitioner came back to India on 6-5-1997. However, this date is not very much crucial for the purpose of this case as the birth of the child Irfana Thasni was on 14-7-1997, as is evident from Ext. A4 birth certificate of the child and the deposition of the appellant/respondent that the respondent/petitioner left for Bombay in September, 1996 and came back from Gulf only two months prior to the delivery of Irfana Thasni. The facts and materials referred above would reveal that the respondent/petitioner had been in Saudi Arabia and that he reached Bombay only on 6-5-1997. In this context, it is relevant to note that the appellant/respondent had herself admitted that her husband came back home only in May, 1997.

13. The above discussions and the oral and documentary evidence regarding the departure of the respondent/petitioner to Bombay enroute to Saudi Arabia and his return to India would reveal the fact that the child Irfana Thasni was born on the 307th day since the respondent/petitioner left for Bombay. The respondent/petitioner has specifically stated that in between the said period he did

not have any access to the appellant/respondent. The evidence of the appellant/respondent as RW. 1 would also reveal that she too did not have a case that in between the said period, they had access to each other. In short, the evidence adduced by the respondent/petitioner in this case to rebut the conclusive presumption of legitimacy of the child Irfana Thasni under Section 112 of the Act is cogent and conclusive and he has succeeded in displacing the said conclusive presumption of law regarding legitimacy by proving the particular fact mentioned in the said section itself viz., non-access between himself and the appellant/respondent at any time when the said child could have been begotten. It is the settled position of law that once the onus of proof is successfully discharged by the party who has the burden to do so, then the burden of proof will shift to the other party. In this case, the respondent/petitioner has succeeded in proving that he had no access. In fact the appellant and respondent had no access to each other during the period the child Irfana Thasni could have been begotten and that she was born on the 307th day since the respondent left for Saudi Arabia. The period mentioned in Section 112 of the Act is 280 days. It is true that the said period of nine months and ten days may sometime vary with individuals. Delivery can take place a few days before or after the said period of 280 days. However, in the facts and circumstances of this case, it was for the appellant/respondent to prove that she had a longer period of gestation and thus discharge her burden of proof to sustain the presumption under Section 112 of the Act. It is relevant to note that during cross-examination, the appellant/respondent had deposed that.

(Vernacular matter omitted....Ed.)

14. The evidence in this case would reveal that there was not even a feeble attempt on the part of the appellant/respondent to show that she had a longer period of gestation. Therefore, it can only be said that the appellant/respondent failed to discharge her onus. As already stated, the respondent/petitioner had succeeded in rebutting the conclusive presumption as contemplated under Section 112 of the Act in regard to the legitimacy of the child Irfana Thasni born to the appellant on 14-7-1997. In the light of the discussions made above, it can safely be concluded that the respondent/petitioner succeeded in displacing the said conclusive presumption of legitimacy in respect of Irfana Thasni, the child born to

the appellant/respondent on 14-7-1997 available under Section 112 of the Act by proving the particular fact of non-access between himself and the appellant/respondent at any time when the child could have been begotten.

15. In the circumstances, we are of the view that the judgment and decree of the Family Court in declaring that the respondent/petitioner is not the father of Irfana Thasni, the child born to the appellant/respondent on 14-7-1997, suffers from no infirmity or illegality warranting appellate interference. Accordingly, we confirm the judgment and decree passed by the Family Court, Manjeri in O.P. No. 236 of 2000.

The appeal is accordingly dismissed. In the facts and circumstances of the case, there will be no order as to costs.

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