

Easwaran Vs. Mani

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Court : Chennai

Decided On : Dec-06-2000

Reported in : (2001)1MLJ318

Appellant : Easwaran

Respondent : Mani

Advocate for Pet/Ap. : Mr. M. Duraiswamy, Mr. Kumarasamy

Judgement :

K. Sampath, J.

1. The Civil Miscellaneous Second Appeal and the Civil Revision Petition arise out of matrimonial/maintenance proceedings. The husband is the appellant in the Civil Miscellaneous Second Appeal and the wife is the petitioner in the Civil Revision Petition.

2. The husband filed a petition for divorce in O.P.No. 68 of 1992 before the Subordinate Judge's Court, Gobichettipalayam, against the wife alleging adultery. The parties were married on 12.6.1975 as per Hindu customary rites and conventions of the families at the residence of the husband at Kuppichipalayam. They were living happily. But, they were not blessed with any child. Medical check-ups were not helpful. According to the husband, at the instance of her father one Perama Gounder, who was also a resident of Kuppichipalayam and her junior

paternal uncle one Chinnu, the wife started pestering the husband for settling his properties in her favour, that as he refused to comply with her request, she developed hatred and malice towards him and on 27.5.1987 she left the matrimonial home without assigning any valid reason and sufficient cause and without his knowledge and went to her father's house, that there was an attempt to settle the issue through local panchayat, that 'nattolai' was sent to her, but she did not respond to the notice to attend the panchayat, that this necessitated his filing a petition for restitution of conjugal rights in O.P.No. 50 of 1987 before the Subordinate Judge's Court, Gobi, that an endorsement was made by both parties on 21.6.1988, that they lived together till the 16th of Avani in 1991, that she left for her parents' house to attend her brother's wife's 'Valaikappu' and that thereafter she did not return to the husband's home. The husband's further case was that she came to the husband's house at the instance and advice of village elders on the first of Ippasi (18.10.1991), but left for her parents house on 20.10.1991 and thereafter refused to come back under some pretext or other, that some months later a gossip spread in the village that she was pregnant and this astonished and shocked him as there was no access to him after Adi, 1991, that he came to know about the birth of a female child to the wife on 26th October, 1992 after more than 365 days since she left the husband's company, that the child was not born to him, that he could not have fathered a child as in the medical check-up done some years prior to the filing of the petition for divorce it was revealed that he had no capacity to produce a child and this fact was known to the wife and her father, that the child had been born as a result of her adulterous life, that she had lost the status of wife and that therefore the marriage should be dissolved.

3. The wife resisted the petition for dissolution of marriage contending inter alia as follows: There was no instigation by her father or maternal uncle to prevail upon the husband to settle properties on her. She did not develop any hatred or malice towards him. After the compromise decree in O.P.No. 50 of 1987 the couple was leading a peaceful matrimonial life till the birth of the child Gnanasekaran. He did not even know whether the child was a male or a female. It was false to say that he had no access to her and that the child was born on account of an adulterous life. They were living, together and having sexual relationship till one month before the birth of the child. It was false to say that the wife left the marital home in Adi,

1991. She left the husband's home only on the 25th of Avani, 1992 (10.9.1992) to her parents' house for confinement. The child was born on 8.10.1992 at Seethalakshmi Hospital, Gobichettipalayam and the date of birth was also entered in the municipal records on 21.10.1992. The medical checkup mentioned in the petition for divorce was a make-belief affair and had been created for the purpose of filing the present false and frivolous petition against her for divorce. She never led an adulterous life at any point of time. Her mind had always been with her husband and her child Gnanasekaran. She had never deserted the husband at any point of time. Only the husband did not allow her to rejoin him. She had also filed a suit in O.S.No. 1 of 1993 seeking for maintenance and for permanent injunction against the husband restraining him from solemnising any second marriage. The petition deserved to be dismissed.

4. On the side of the husband, Exs.P-1 to P-5 were marked. He examined himself as P.W.1, one Dr. Dhakshinamurthy as P.W.2 and two other witnesses one Madhu alias Madhappan and one Raman as P.Ws.3 and 4. On the side of the wife, the birth certificate of the child was marked as Ex.R-1. She examined herself as R.W-1.

5. The learned Subordinate Judge rejected the case of the husband holding that he had not specified the person with whom the wife had committed adultery and conceived and had not established the same, that he had also not further established that after the marriage between the two there was a medical examination done, that the documents Exs.P-2 and P-4 purporting to be the certificates issued to show that the husband was not capable of producing children, had not been properly proved, that the witnesses connected with those documents had not been examined, that soon after his alleged coming to know about the wife having conceived, he did not immediately rush to the Court, that all the allegations had been made with an ulterior motive to secure a divorce and that he had not established that after the compromise in O.P.No. 50 of 1987, she left the marital home long before the actual birth of the child. The learned Subordinate Judge dismissed the petition for divorce by order dated 10.1.1996.

6. The husband filed appeal C.M.A.No. 14 of 1996 before the learned Principal District Judge, Erode. Along with the appeal he took out an application in I.A.No. 111 of 1996 for both the parties to undergo DNA test to be carried out by C.C.M.B. Institution at Hyderabad to find out the paternity of the child. The learned Principal District Judge by judgment dated 8.11.1996 confirmed the decision of the trial Court and dismissed the appeal. The learned Principal District Judge also dismissed the application taken out by the husband for undergoing DNA test as belated and as an after-thought.

7. As against the decision of the learned Principal District Judge, the present Civil Miscellaneous Second Appeal has been filed. At the time of admission the following substantial questions of law were raised for decisions:

(1) Whether the Courts below are correct in dismissing the petition for divorce holding that there was no direct evidence regarding the illicit sexual intercourse person?

(2) Whether the Courts below are correct in dismissing the petition for divorce on the ground of adultery when the specific allegation of the appellant is that there was no sexual relationship between the petitioner and his wife for more than 400 days? and

(3) Whether there could have been any procreation as the petitioner is not in a position to produce sperms with fertility?

8. Mr. A.K. Kumarasamy for Mr. M. Duraiswamy, learned Counsel for the appellant, submitted that the Courts below were in error in overlooking very material facts while holding that the husband had not made out a case for divorce. The learned Counsel submitted that the husband had produced adequate materials to show that he was incapable of producing a child, that the wife left the husband more than 400 days before the child was born and that the Courts below were in error in rejecting the oral evidence on the side of the husband as also the Doctor's evidence. The learned Counsel further submitted that the lower Appellate Court was in error in dismissing the application for the parties to subject themselves to DNA analysis and that this could be ordered even now.

9. Mr. T.P. Manoharan, learned Counsel for the wife/respondent submitted that the husband had come up with a false case and had made serious allegation against the wife that she was guilty of infidelity, that she had begotten a child in an adulterous relationship, that the Courts below had concurrently found that the case of the husband that she had committed adultery had not been established and that the Courts below had properly appreciated the materials on records and reached a decision, which could not be taken exception to. The learned Counsel also submitted that the husband had not specified any particular person as the adulterer, that the petition for divorce itself was not maintainable in the absence of the alleged adulterer. In this connection, he relied on the Full Bench decision of this Court in Vijayan alias Mathew Vijayakumar v. Bhanmundari (1995) 1 M.L.J. 112 and the decision of S.S. Subramani, J. (as the learned Judge then was) in Rajee v. Baburao (1995) T.L.N.J. 239.

10. As regards the submission on behalf of the husband that the parties should undergo DNA test, the learned Counsel submitted that it was too late in the, day to come forward with this suggestion and that in any event, in law the parties could not be compelled to undergo any test. In this connection the learned Counsel relied on the judgment of the Supreme Court in Goutam Kundu v. State of West Bengal and Anr. : 1993 CriLJ3233 .

11. The parties were married in 1975. They had a family life for 12 years and in 1987 the wife left for her parents' house which provoked a petition by the husband for restitution of conjugal rights in O.P.No. 50 of 1987 which ended in a compromise in 1988, as per the terms of which the wife returned to the husband's home and they lived together, according to the husband till Avani, 1991 and till Avani, 1992 according to the wife. It is seen that the parents of the wife also belong to the same village. It is stated in paragraph 5 of the petition that the wife's father was also residing at Kuppichippalayam. It is not as if the wife went far away from the husband's home. They were living in the same village. Though it was alleged by the husband that he did not have access to his wife after Avani, 1991, it was not substantiated and in fact, it was the specific case of the wife that till one month before the birth of the son, she was living with her husband. The husband also had not given the name of any particular individual as the adulterer. In the

absence of any particular individual being named and in the absence of proof of want of access to the parties living in the same village, it is very dangerous to come to the conclusion that the wife committed adultery exposing herself to be slapped with a proceeding for divorce.

12. Law is well settled that a strong case of non-access of the husband has to be made out by the person questioning the legitimacy on whom the burden of rebuttal of presumption of legitimacy lies. The presumption arising under Section 112 of the Evidence Act is an impregnable one and a strong prima facie case has to be made out by the husband that he had non-access or to dispel the presumption. It has been so laid down by the Supreme Court in *Goutam Kundu v. State of West Bengal and Anr.* : 1993 CriLJ3233 ,_ the presumption arising under Section 112 had not been dispelled by the husband by production of enough material. The witnesses examined on the side of the husband had not in so many words said that the husband had no access to the wife. They had merely stated that the wife used to quarrel with the husband and go away. This kind of evidence is wholly inadequate to dispel the presumption arising under Section 112 of the Evidence Act.

13. Mr. A.K. Kumarasamy, learned Counsel for the husband/appellant placed considerable reliance on Exs.P-2 and P-4 purporting to be the certificates issued by the laboratories and the oral evidence of the Doctor at whose instance tests were conducted and it was found that the husband was not in a position to procreate. The laboratory technician who conducted the test had not been examined and those certificates had come into existence very close to the filing of the petition for divorce and the Courts below had rightly come to the conclusion that much reliance could not be placed on those certificates and the oral evidence of the Doctor. I do not think that any exception can be taken to the approach by the Courts below in holding that the husband had not proved that he was incapable of fathering a child.

14. If we eliminate Exs.P-2 and P-4 and the oral evidence of the Doctor, we are left only with the evidence of the husband himself, which cannot be taken on face value. Mere allegation that the wife Had committed adultery without naming the

person alleged to have had liaison with the wife, is not sufficient. The person with whom the wife had illicit relationship should have been named and made a party in the proceedings. The husband saying that he does not know the person with whom the wife had illicit relationship will not take him anywhere.

15. It has been held in *Rajee v. Baburao* 1995 T.N.L.J. 239 as follows:

In a petition for divorce, rules require that the specific act of adultery and the occasion when and the place where such acts were committed together with the name and address of the person with whom such adultery was committed, should be given.

As already noticed, these details are lacking in the petition. The husband had alleged that there was non-access for over 400 days. That is wholly inadequate for the purpose of proving adultery.

16. It will be worthwhile to extract a passage from the decision in *Rajee v. Baburao* 1995 T.N.L.J. 239 and it is as follows:

There must be clear proof of adultery. The mere fact that the husband considers the conduct of the wife open to suspicion is not sufficient. The mere fact that a panchayat of the community condemned the wife's conduct is not a ground for the Judge to base his finding on the evidence before him, whether the wife was living in adultery. Though direct evidence of adultery may not be possible from the nature of the offence, there must be some evidence showing opportunity and desire to commit the offence of access. Mere hole and corner cattle or bazaar gossip will not prove adultery. In general, we require corroboration to confirm the testimony of the applicant regarding the material facts in issue and corroboration is, as a rule, demanded in regard to alleged admissions and confessions. No doubt, in most cases the evidence as to adultery would be circumstantial in character. But, such circumstances must satisfy the test that regarded together, they lead to an irresistible inference that adultery must have been committed.

As pointed out by the learned Judge, the finding of adultery has necessarily to be based on some sort of positive evidence superior to suspicion.

17. The Full Bench decision relied on by the learned Counsel for the wife/respondent in Vijayan alias Mathew Vijayakumar v. Bhanusundari (1995) 1 M.L.J. 112. arose under Section 10 of the Divorce Act (IV of 1869). Under the said Act, the adulterer is to be impleaded as co-respondent or permission has to be obtained from Court under Section 11 of the said Act for proceeding with the petition without impleading the adulterer. There is no material in the instant case to find out that the wife had any illicit sexual intercourse with any other person. The mere fact that allegations have been made that the husband had no sexual relationship with the wife for more than 400 days would not in any way advance the case of the husband. Allegation without proof is of no use whatsoever. I have already held that the husband has not substantiated his stand that he was not in a position to procreate.

18. We are now left with the dismissal of the application for undergoing DNA test by the couple. Mr. Kumarasamy, learned Counsel for the appellant, contended that if really the wife had been loyal to the husband and if really she had nothing to hide, there should not be any objection on her part to undergo the test now. Though this proposition appears to be attractive. One has to look at it from the wife's angle also. Except for some skirmishes during their living together, it does not appear that there was any want of love and affection on the part of the wife for the husband. In fact, the parties agreed to bury the hatchet and make a marriage of it in the year 1988 by entering into a compromise in the application filed by the husband for restitution of conjugal rights. It is the admitted case of the husband himself that after 1988 till Avani 1991 at least they had a peaceful and happy life. It is specifically stated in the counter by the wife that she continued to have affection for the husband and only the husband and the child mattered to her. It would be too much to impose on her a medical test on mere suspicion.

19. The Supreme Court in Goutam Kundu v. State of West Bengal : 1993 CriLJ3233 , already referred to has come down heavily on such orders for tests, being passed by Courts in a casual manner. In paragraph 18 it is stated as follows:

Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by Courts as a circumstantial evidence which ultimately

excludes a certain individual as a father of the child. However, it requires to be carefully noted that no person can be compelled to give sample of blood for analysis against his/her will and no adverse inference can be drawn against him/her for this refusal.

The Supreme Court has referred to a number of other decisions and in paragraph 20 the Supreme Court extracted a passage from the decision of the Allahabad High Court in *Bharti Raj v. Sumesh Sachdeo* : AIR1986 All259 , which is to the following effect:

The position which emerges on reference to these authoritative texts is that depending on the type of litigation, samples of blood, when subjected to skilled scientific examination, can sometimes supply helpful evidence on various issues, to exclude a particular parentage set up in the case, but the consideration remains that the party asserting the claim to have a child and the rival set of parents put to blood test must establish his right so to do. The court exercises protective jurisdiction on behalf of an infant. In my considered opinion it would be unjust and not fair either to direct a test for a collateral reason to assist a litigant in his or her claim. The child cannot be allowed to suffer because of his incapacity; the aim is to ensure that he gets his rights. If in a case the Court has reason to believe that the application for blood test is of a fishing nature or designed for some ulterior motive, it would be justified in not acceding to such a prayer.

As pointed out by the Supreme Court,

the presumption of legitimacy is this, that 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 filiation (parentage) may be presumed, the law in general presuming against vice and immorality.... This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

Summing up, the Supreme Court observed as follows:

- (1) The Courts in India cannot order blood test as a matter of course;
- (2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained;
- (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act;
- (4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman; and
- (5) No one can be compelled to give sample of blood for analysis.

In the course of the judgment, the Supreme Court referred to a decision by the Kerala High Court in *Vasu v. Santha* (1975) K.L.T. 533, which has gone to the extent of saying that even proof that the mother committed adultery with any number of men will not by itself suffice for proving the illegitimacy of the child as long as she had access to the husband during the time the child could have been begotten and that the law could not countenance any attempt on the part of the husband to prove that the child was not actually his. The Kerala High Court has observed:

The evidence of non-access for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. The standard of proof in this regard is similar to the standard of proof of guilt in a criminal case. These rigours are justified by considerations of public policy for there are a variety of reasons why a child's status is not to be trifled with. The stigma of illegitimacy is very severe and we have not any of the protective legislations as in England to protect illegitimate children. No doubt, this may in some cases require a husband to maintain children of whom he is probably not the father. But, the legislature alone can change the rigour of the law not the Court. The Court cannot base a conclusion on evidence different from that required by the law or decide on a balance of probability which will be the result if blood test evidence is accepted.

As pointed out by the Supreme Court, access and non-access mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual co-habitation.

20. I have already pointed out that the parents of the wife were also residents of Kuppichippalayam where the husband also lived. The access of the husband cannot be ruled out.

21. It has been pointed out in *P. Balasubramanian v. Smt Vijayalakshmi Balasubramanian* : AIR 1999 SC3070 , that the allegation that the wife had sexual intercourse with a person other than the husband is a serious allegation against the wife and shows the cruel conduct of the husband entitling the wife to seek relief against him under the Act (Hindu Marriage Act) or otherwise.

22. For all the reasons stated above, I hold that the case of the husband has to fail. All the substantial questions of law are answered against the appellant. The Civil Miscellaneous Second Appeal is dismissed.

23. The Civil Revision Petition arises out of the order passed by the learned Additional District Munsif, Bhavani in I.A.No. 37 of 1998 in O.S.I of 1993 filed by the husband seeking stay of the proceedings in the suit for maintenance filed by the wife under Section 10 of the Code of Civil Procedure pending disposal of the divorce case. Now that the Civil Miscellaneous Second Appeal is disposed of, the Civil Revision Petition will stand allowed and the order of stay granted by the lower Court under Section 10 of the Code of Civil Procedure will stand set aside.

24. There will, however, be no order as to costs in both the civil miscellaneous appeal and the Civil Revision Petition. Consequently, the direction petition C.M.P.No. 4352 of 1999 is closed.