

Shyam Sing Vs. Saibalini Ghose

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Court : Kolkata

Decided On : Jul-17-1946

Reported in : AIR1947Cal183

Appellant : Shyam Sing

Respondent : Saibalini Ghose

Judgement :

Ellis, J.

1. In this case, a Rule was issued on the District Magistrate of Burdwan and on the opposite party Saibalini Ghose to show cause why an order passed by Mr. P.C. Gope, Magistrate of the First Class at Asansol on 27-11-1945 requiring the petitioner, Shyam Sing to pay ten rupees per month for the maintenance of the child which the opposite party Saibalini Ghose bore him should not be set aside. The opposite party Saibalini Ghose was married to one John William who appeared in the proceedings as the petitioner's witness No. 2 in 1935. According to her own case she was deserted by John William in 1936 since which date she has never seen him. In 1943 she went to live with the petitioner Shyam Sing who is a mistry in the employ of the Indian Iron and Steel Company and is a widower. When she announced to the petitioner Shyam Sing that she had conceived he requested her to take some medicine in order to procure abortion. Saibalini Ghose refused to do so and accordingly Shyam Sing turned her out of the house in

September 1944. On 2-4-1945 she was delivered of a child and on 24-4-1945 she instituted proceedings under Section 488, Criminal P.C., against Shyam Sing claiming maintenance in respect of this child. On 27th of November she obtained an order requiring Shyam Sing to contribute ten rupees per month for the maintenance of the child and the order was affirmed by the Sessions Judge on 14-2-1946. The petitioner Shyam Sing has now moved this Court to have the order set aside. It is his case that Shibalini Ghose lived in his house as a maid servant for eighteen months during the years 1943 and 1944. During that time she became unduly familiar with his cook Janral Singh and on that account he turned her out of his house. He claims that she has entered into a conspiracy with Jarnal Singh in order to make him pay under Section 488, Criminal P.C. It may be noted that the opposite party's husband John William who is a subordinate to the petitioner Shyam Sing gave evidence on his behalf.

2. Mr. N.C. Talukdar who has appeared on behalf of the petitioner has relied upon a ruling of this Court reported in ('35) 62 Cal. 1080 (1083). It is the case of Joseph Anthony Sweeney v. Mercy Beatrice Catherine ('35) 62 Cal. 1080 (1083) under Section 17, Divorce Act. In the judgment in that case Costello J. referred to the English decision in Russell v. Russell (1924) 1924 A.C. 687 and observed:

The law is this: there is a presumption of law that the child of a married woman was begotten by her husband, and neither a husband nor a wife is permitted, with the object or possible result of proving that a child born to the wife during wedlock is not the child of the husband, to give evidence showing or tending to show that they did not have sexual relation with each other at the time when the child could have been conceived. This rule is applicable not only to cases in which the legitimacy of the child is directly in issue, but also to proceedings instituted in consequence of adultery, where the fact of the wife's adultery is sought to be established by proof that she has given birth to a child of which the husband is not the father. The rule excludes evidence by the husband on the point of non-access, and also evidence of any facts from which non-access might indirectly be presumed. The fact of non-access can, however, be proved by evidence aliunde.

Mr. Talukdar has relied on this observation of Costello J., as showing that the evidence of Saibalini Ghose in these proceedings as showing that the child which she bore was the child of Shyam Sing and not the child of her husband John William was inadmissible in law. Costello J. was sitting with two other Judges whose observations may also be noted. M.C. Ghose J., observed:

The learned Judge has come to the conclusion on the uncorroborated testimony of the husband that he had no access to his wife at any time when the child which was born on 3-1-1932, would have been begotten. It was held in *Russell v. Russell* (1924) 1924 A.C. 687 and also in many previous decisions that the evidence of the husband alone is not sufficient to prove non-access. It must be proved by evidence other than that of the husband.

Henderson J. also stated that

the petitioner appears to have made a case that his wife was living in open adultery with the co-respondent at Kharagpur. As he himself was living elsewhere, it is quite obvious that he was not in a position to give any real evidence on the point, and he should have examined witnesses who are in a position to do so. It is not at all dear from the judgment of the learned Judge on what he based his decree. If he intended to rely on the mere proof of the birth of the child, he has entirely ignored the provisions of Section 112, Evidence Act. Apart from any consideration of the admissibility of evidence of this kind, the deposition of the petitioner as recorded, even if accepted in full would not amount to proof of non-access.

So the other two Judges do not subscribe fully to the observation of Costello J., and they appeared to hold that the evidence of the husband was admissible but was not sufficient to prove non-access.

3. The relevant section in this case is Section 112, Evidence Act. That section reads:

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its

dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

In this section there is nothing at all to show that the husband or the wife is precluded from giving evidence in order to show that they had no access to each other at any time when the child could have been begotten. This is a view which we ourselves take with regard to proceedings under Section 488, Criminal P.C., and in this view we are fortified by a decision of the Bombay High Court reported in *Kamala Bai v. Babubhai Shivashankar* : AIR1926 Bom348 and a decision in *G.B. Sane v. D.S. Sonavane & Co.* ('46) 33 A.I.R. 1946 Bom. 110 (113) and the latest decision of the Madras High Court in *Hanumantha Rao v. Ramachandrayya* : AIR1944 Mad376 where their Lordships observed that the

law governing the proof of legitimacy of a child born during the continuance of a marriage is laid down in Section 112, Evidence Act. The fact that the child was born during the continuance of a valid marriage between the mother of the child and her husband is conclusive proof that the child is a legitimate child of the husband, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten.... There is nothing in the Evidence Act which debars a husband from giving evidence of non-access to his wife, even though the effect of such evidence may tend to prove that a child born during the continuance of the marriage to the wife is illegitimate.

Their Lordships observed that they were not concerned in that case with the question whether Section 7, Divorce Act, can be read as importing the rule with regard to *Russell v. Russell* (1924) 1924 A.C. 687 into the trial of divorce proceedings in India.

4. The case in which the observation of Costello J., was made was a case under Section 17, Divorce Act, for confirmation of a decree for dissolution of marriage made by the District Judge of Midnapore and of course cases under the Divorce Act come within the ambit of Section 7 of that Act which says that subject to the provisions contained in that Act the High Courts and District Courts shall, in all

suits and proceedings, thereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. We find then that in this case the observations made by Costello J. in the case reported have no application. The evidence on record shows that the point as to whether or not the husband had access to his wife at the material time was never appreciated in the Courts below. The evidence of the opposite party, Saibalini Ghose contains only one sentence to the effect that she had not seen her husband after 1936. She was not apparently cross-examined with regard to the possibility of her husband having access to her after that date. It is still more surprising that when the husband came forward and gave evidence as petitioner's witness 2 and claimed that the child was his own he was never asked a single question in cross-examination as to where he was living, the time, the place or the conditions under which he had access to his wife Saibalini Ghose. Another witness examined on the side of the second party petitioner was the Chaplain of the Methodist Episcopal Church at Asansol who deposed that in the year 1941 he had once or twice seen the first party Saibalini Ghose and her husband, in the weekly service in Saragdi Church. He stated that the marriage between them had not been dissolved and neither of them had made any complaint to him against the other. This evidence does not show whether the husband and wife went together to the church which is a point which should have been elicited.

5. In the interests of justice we think that the proper order to make is that the order calling upon the petitioner to pay maintenance at the rate of ten rupees per month in respect of the child be set aside and the case remanded to the Magistrate for him to allow the parties an opportunity to adduce evidence on the point as to whether or not the husband did have access to his wife at the material time so that a conclusion can be drawn as to whether or not the child which he claims as his was really begotten by him. The Rule is accordingly disposed of in these terms.

Akram, J.

I agree.

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