**Partap Vs. Veena**

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**Court** : Himachal Pradesh

**Decided On :** Aug-09-1995

**Reported in** : II(1997)DMC626

**Judge** : Kamlesh Sharma and; L.S. Panta, JJ.

**Acts** : Evidence Act, 1872 - Sections 4 and 112; ;Hindu Marriage Act, 1955 - Section 13(1)

**Appeal No.** : F.A.O. No. 149 of 1992

**Appellant** : Partap

**Respondent** : Veena

**Advocate for Def.** : Bhupinder Gupta, Adv.

**Advocate for Pet/Ap.** : Ajay Sharma, Adv.

**Disposition** : Appeal dismissed

**Judgement** :

**Kamlesh Sharma, J.**

1. This appeal, under Section 28 of the Hindu Marriage Act (hereinafter called the 'Act'), is directed against the judgment dated 18.1.1992 passed by Additional District Judge (1), Kangra Division at Dharamshala, Camp at Palampur whereby

the petition under the Section 13 of the Act filed by the appellant-husband for dissolution of his marriage with the respondent-wife and decree of divorce was dismissed.

2. The marriage between the parties was solemnized on January 27, 1989. Admittedly, the marriage was consummated and the parties lived together as husband and wife in their matrimonial home at Village Kandthala, Tehsil Palampur, District Kangra till 12th February, 1989 when the appellant-husband returned to his posting in Arunachal. Thereafter, the appellant-husband came on annual leave and lived with respondent-wife from 20th December, 1989 to 11th February, 1990.

3. The case set up by appellant-husband in his petition was that he received letters/telegrams from his brother that respondent-wife had left the matrimonial home on 13th April, 1990 without disclosing that she was going for the purpose of delivery to her parents' house, where she delivered a male child on the same day. According to the appellant-husband, 'the child born to respondent was not from the lions of the appellant, but has been born from someone else due to illicit sexual intercourse with that other person'. During the period from 20th December, 1989 to 11th February, 1990 the respondent remained in his company, she did not disclose the factum of pregnancy to him and after she had left the matrimonial home she gave birth to a male child out of the adulterous relations. In para 12 of the petition, the appellant-husband has further stated that despite his best efforts he could not find out the name of the adulterer with whom the respondent- wife had sexual intercourse, therefore, the said adulterer could not be arrayed as co-respondent and sought permission to dispense with the requirement of impleading the adulterer as co-respondent under Rule 7, of the Hindu Marriage and Divorce H.P. Rules, 1982 (hereinafter called the Rules'), for which separate application was filed. The appellant-husband had also made allegations in his petition that he was told by his parents and brother that in his absence respondent- wife used to visit her parents frequently on one pretext or the other without informing them or taking their permission.

4. The respondent-wife opposed the petition for divorce and denied the allegations made therein. According to her she gave birth to a male child on 12th July, 1990

and not on 13th April, 1990. She has also stated that it was a premature delivery in about seven months of the pregnancy She has further stated that parents of the appellant-husband very well knew about the pregnancy and according to the custom they had consented that she might go to her parents' house for the purpose of delivery. It is specifically denied that the child born to the respondent-wife is not from the lions of the appellant and she had sexual inter- course with some other person. As per allegations, in order to get remarried the appellant-husband had levelled false charge of adultery on her.

5. On the pleadings of the parties, the following issues were framed :

1. Whether the respondent is living in adultery and has given birth to an illegitimate child from the lions of some other person than the petitioner, if so, its effect OPP.

2. Relief.

6. The Additional District Judge gave permission to the appellant-husband to file the divorce petition without impleading the alleged adulterer and tried the petition. To prove his case the appellant-husband appeared as his own witness as PW-1 and produced his brother Punjab Singh PW-5 and Kamla Devi, midwife PW-2, Partap Singh, Pradhan, Gram Panchayat, Bhagotla, PW-3 and Raj Kumar a Multi Purpose Worker, Sub-Centre, Chechian, PW-6. In defence respondent-wife has appeared as her own witness as RW-1 and has produced her mother Kaushalya Devi RW-3, Soma Devi, midwife, RW-2 Mohabbat Singh RW-4.

7. Appellant-husband Partap Chand, PW-1 has reiterated the allegations made in his petition. Though he has adduced that when he came to his house on leave in the month of December, 1989, the respondent-wife lived with him for 2/ 3 days and thereafter left for her parents' house on the pretext of stomach-ache yet in his cross-examination he has admitted that during his presence she never left her matrimonial home on some pretext. He has further shown his ignorance whether respondent-wife used to leave her matrimonial home in his absence without the consent of his parents. His brother Punjab Singh, PW-5, has supported the appellant-husband to the extent that respondent-wife used to leave the matrimonial home without his consent and that of his parents. According to him

she had not disclosed either to his parents or to him that she was pregnant and she had given to a male child. He stated that she left their house on 13.4.1990, Friday and on same day she delivered the child about which they were told by her elder sister. He has admitted in his cross-examination that he was residing in Village Uperli Kothi which is at a distance of 50 kilometres from his house where he was posted as teacher and used to visit his house at the interval of 2/3 months.

8. The other witness Krishna Devi, PW-4, who is admittedly cousin sister of respondent-wife and married to one of the brothers of appellant-husband has stated that in the month of Baisakh, 1990 she had Katha in her house in which elder sister of respondent-wife had participated and told her that her younger sister i.e. respondent-wife had given birth to a male child. Kamla Devi, PW-2, who was working as mid wife has been produced to state that in the month of Baisakh in the year 1990 she assisted respondent-wife in her delivery of a male child at the instance of her brother. According to her the delivery was premature as it had taken place before the completion of nine months. She has stated that the birth of child was after the gestation period of 8 or 8 1/2 months. As per her statement she had got the date of birth of the child recorded in the dispensary. In her cross-examination though she has admitted that she had assisted as midwife in 400 deliveries during last 3/4 years but she was not able to give the particulars of those children. She has given the gestation period of the child as 8 or 8 1/2 months looking to his health. She has denied that child was born after seven months' gestation period because according to her such a child does not survive but she has further qualified statement by saying that 5% of such children do survive. She has categorically denied that delivery of respondent-wife was conducted by another Midwife named Soma as, according to her, there was no midwife by this name in the Ilaqa.

9. For proving the entry in the Birth Register, the appellant-husband has produced Partap Singh, PW-3 and Raj Kumar, PW-6. Partap Singh, PW-3 who was Pradhan of the Gram Panchayat, Bhagotla' had deposed from the birth register of the Panchayat that at Serial No. 28 an entry was made on 17.10.1990 in respect of birth of the child as per the orders dated 5.10.1990 of Magistrate, Palampur which was later on cancelled on 29.12.1990. He has also produced on record and copies

of said orders as Exts. P-l and P-2. In his cross-examination he has admitted that in the Panchayat record the date of birth of the child was not recorded. However, it was ordered by the Magistrate that the date of the child be recorded as 12th July, 1990. Raj Kumar PW-6 has also produced a Register in which at Serial No. 20 in the year 1990 an entry in respect of birth of a male child was recorded, a photocopy of which is produced on record as PW-6/ A. According to him, this entry was got made by Kamla Devi, PW-3. In his cross-examination he has explained the cutting made in the Column No. 3 that firstly he had noted the name of the child as Ajay and thereafter corrected it by writing the name of his father as Partap though he had not initialled it.

10. The respondent-wife, RW-1, has reiterated her stand that she gave birth to a child on 12th July, 1990 and not on 13.4.1990 as alleged by appellant-husband. According to he, the child was born from the lions of appellant-husband. She has further stated that she used to go to her parents' house with the consent of her in-laws and for the purpose of delivery also she had gone with their permission. She has also deposed that delivery was premature and had taken place in 7th or 8th month, when 8th month was running. She has categorically denied that Kamla Devi, PW-2, was the midwife who assited her in the delivery. Instead she has given the name of midwife as Soma Devi, who has also appeared as RW-2. According to her, she had been informing about her pregnancy to appellant-husband through letters which he had also acknowledged. She has further stated that false allegation of adultery has been made against her in order to get divorce. In her cross-examination she has explained that, her mother, Kaushalya Devi, RW-3, had gone to Panchayat for the registration of the birth of the child but Panchayat people directed her to go to Tehsil Office where it was got registered, thereafter the entry in respect of birth of the child was made in the Panchayat record on the basis of record of Tehsil Office. She also produced a photocopy of the certificate of birth which is mark 'A'. She had further stated that Dispensary is in Village Bhagotla which is at a distance of two kilometres from the village of her parents. According to her, the appellant-husband remained on leave from 12.12.1989 to 11th February, 1990 and not from 20.12.1989.

11. Witness Soma Devi, RW-2, had supported the respondent-wife that she had got delivered her child in the month of Savan. According to her, the child was born premature when 8th month was running and weak. In her cross-examination she had admitted that she was not a registered midwife. RW-3, Kaushalya Devi, mother of respondent-wife was not able to tell the date of birth of the child. However, she has stated that Secretary, Panchayat directed her to get the orders from the office of Tehsil to get the birth of the child registered as more than one month had passed since his birth. She has also stated that the child was got delivered by Soma Devi, midwife. In her cross-examination, she has deposed mat respondent-wife had come to her house two months before her delivery. She has admitted that Krishna Devi, PW-4, is related to her as niece and also to respondent- wife as 'Jethani'. She has denied the suggestion made to her that the child was born on the Baisakhi day after nine months of gestation period. Another witness, Mohabbat Singh, RW-4, who is resident of Kusmal and Member Panchayat, has stated that he had visited the house of parents of respondent-wife to congratulate them on the birth of the child which had taken place during rainy reason.

12. Before we appreciate the evidence on record, we would like to point out that the charge of adultery is serious charge as it casts aspersions on the character of the spouse and affects his/her reputation in the society, besides raising question mark on respect of parentage of the child delivered by the wife, therefore, not only the pleadings in respect of charge of adultery should be specific, it should also be established in all probabilities. Direct evidence may not be available and inference of adultery may be drawn from circumstantial evidence but these circumstances should be such which would lead to the inference of adultery in all probabilities. It is correct that proceedings under Hindu Marriage Act are not criminal proceedings where proof beyond reasonable doubt is required and mere preponderance of probabilities is not enough. The proceedings for divorce, on the ground of adultery, under the Act, are in the nature of quasi-criminal, as such, higher standard of proof than mere preponderance of probabilities is required.

13. In the case in hand, it is not in dispute that respondent-wife has given birth to a child during the continuance of valid marriage between her and appellant-

husband, as such Section 112 of the Evidence Act is attracted which provides that birth of a child during the continuance of a valid marriage, is a conclusive proof of legitimacy. Section 112 of the Evidence Act is :

'112. 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 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.'

14. Section 4 of the Evidence Act gives meaning to the words 'May presume', 'Shall presume and 'Conclusive proof'. The words 'may presume' merely enable the Court to raise or not to raise presumption while the words 'shall presume' require the Court necessarily to raise the presumption. In both these situations presumption is rebuttable which means that the presumption holds 'until it is disproved'. But the definition of conclusive proof is :

'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.'

The perusal of this definition clearly shows that wherever the Legislature has used the word 'conclusive proof' in the Evidence Act, there is no question of rebuttal, that means no evidence will be permitted to be adduced for the purpose of disproving it. Giving this meaning to the words 'conclusive proof' used in Section 112 of the Evidence Act, if the birth of the child has taken place during the continuance of a valid marriage between the respondent-wife and appellant-husband, the legitimacy of the child vis-a-vis appellant-husband is to be deemed as 'conclusively proved' and no evidence can be permitted to be adduced for its rebuttal. However, this section provides a single exception which is--

'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.'

Access and non-access again cannote, as has been held by Privy Council in Karappa v. Mayandi, AIR 1934 PC 49(A), existence and non-existence of opportunities for marital intercourse....Proof of non-access must be clear and satisfactory. It may be pointed out that presumption of legitimacy is highly favoured by law and it is necessary that proof of non-access must be clear, satisfactory and of high degree of probability. The burden of proof is on the spouse who alleges adultery. This burden can be discharged by proof which need not reach certainty but must carry a high degree of probability, AIR 1984 Punjab and Haryana 99, Mr. Veenu Handa v. Narinder Kumar Handa, AIR 1954 SC 176, Chilukuri Venkateshwarlu v. Chilukuri Venkatanarayana, (Please see 1995(1) HLR 455, Bodanapu Khamraiah v. Bodanapu Siddamma and Anr., 1995(1) HLR 603, A.T. Mathew v. Anamma Mathew, 1995(1) HLR 675, Mohammed Raheemunnisa @ Ghousia v. Mohammed Iqbal Pasha and State and AIR 1989 H.P. 29, Smt. Parvati v. Shiv Ram and Anr.).

15. In view of the provision of Section 112 of the Evidence Act and settled legal position as enunciated in the judgments, referred to herein-above, we have to examine whether in the case in hand the appellant-husband has been able to produce such evidence that he had no access to the respondent-wife at the time she had begotten the child. It is admitted by Kamla Devi, PW-2, the midwife, who according to appellant-husband had assisted in the delivery of respondent-wife, that the child was premature and had taken birth after 8 or 8 months of gestation period which was only guess work based on the physical health of the child which has been controverted by Soma Devi, RW-2, another midwife produced by respondent-wife, and Kaushalya Devi, RW-3, the mother of respondent-wife. On the basis of the oral evidence of these witnesses, no conclusion can be arrived at in respect of the date of birth of the child. Even the documentary evidence Ext. PW-6/A, photocopy of the relevant entry in the Register maintained in the Dispensary is also of not much assistance as admittedly it was got made by Kamla Devi, PW-2, but neither her name and other particulars are mentioned as informant nor she has signed the Register as provided under Section 11 of the Registration of Births and Deaths Act, 1969. It is also not proved that the Register in the Dispensary was maintained by the Competent Authority as prescribed under the said Act and Rules. Moreover, the cutting made in the column No. 3 has not

been initialled by its scribe which further raises doubt about its authenticity. So far the evidence in respect of record of Panchayat is concerned, it is admitted by Partap Singh, PW-3, that it was made on the basis of order dated 5.10.1990 issued by Executive Magistrate, Palampur which was later on suo-motu cancelled by same Executive Magistrate on 29.10.1990.

16. Therefore, in the totality of evidence on record, we have no hesitation to hold that appellant-husband has failed to prove that the child was born on 13.4.1990 after full gestation period of nine months. Admittedly, the appellant-husband was on annual leave from 12th December, 1989 to 11.2.1990 during which period he lived and cohabited with respondent-wife. It cannot be believed that he had not come to know that respondent-wife was having pregnancy of 6/7 months in the beginning of February, 1990 if his allegations are believed that she had given birth on 13th April, 1990 after gestation period of nine months. The statement of his brother Punjab Singh, PW-5, is also a pack of lies that he or his parents did not know that respondent-wife was pregnant on 13.4.1990 when she left the house for the house of her parents to deliver a child on the same very day. It seems that for some ulterior motive they have instigated the appellant-husband to such an extent that he has even denied that he is the father of the child born to respondent-wife. We do not find any reason to disbelieve the respondent-wife that she gave birth to a premature child on 12th July, 1990 after 204 days from 20th December, 1989 when admittedly the appellant husband had access to her. To decide whether it was possible for a fully developed child to be born after 204 days, we may refer to Modi's Medical Jurisprudence and Toxicology, 21st Edition page 401, wherein under the heading The Minimum period of Pregnancy on the viability of a Child it is said that :

'This question can be answered by determining the inter-uterine age of the foetus from its length, weight and other characteristics, and in most of these cases it will be found that the foetus is riot full term, and yet is capable of living. The question, therefore, resolves itself into another viz. what is the shortest period of gestation at which a viable child can be born

Children born at or about 210 days or 7 calendar months of uterine life are viable, i.e. are born alive and are capable of being reared. Hubbard records a case where an infant born at the beginning of the seventh month of pregnancy weighed only 15 ounces, and at the age of six weeks was in good health and weighed 32-3/4 ounces. Children born after 6 calendar months or 180 days of uterine life may be viable and capable of continuing an independent life apart from their mothers. Haulihan reports the case of a primipara, who was delivered of a premature living male infant on July 29, 1932, after 6 months of gestation. At birth the infant was 14 inches long and weighed 23 ounces. At the end of 12 weeks it weighed 90 ounces. Fakim also reports a case where a woman, aged 31 years, was delivered of a female child, weighing 1 lb. after 26 weeks of pregnancy. After a few days the child was 13 inches long. An X-Ray examination of the child on the 18th day after birth showed the presence of the ossification centres of the calcaneus and astragalus. The centres of ossification for the lower epiphysis of the femur and the upper epiphysis of the tibia had not appeared at that time. The centre of ossification was present in the elower epiphysis of the femur on the eighty-first day after birth. Five months and half after birth the child weighed 6 lb. 12 ozs. Cases have also been reported where infants born after still shorter periods of intra-uterine life have survived and grown up. In the case of Clark v. Clark, the President of the Divorce Court held that a child born after 174 days of intra-uterine life was able to live and was a legitimate child. At birth the child weighed 2 pounds. In rare cases, children born in the fifth calendar month or even as early as the fourth month survive for a short time, but they can never be conceived as having reached the period of viability. Richard H. Hunter describes the case of a foetus of 5 months of intra-uterine life who lived for 18 hours after birth. It was 30 cm. long and weighed 512 grammes.

17. In view of the medical opinion, stated hereinabove, we have no hesitation to hold that the respondent-wife had given birth to a fully developed child after 204 days from 20th December, 1989 when admittedly the appellant-husband had access to her. The child born to respondent-wife is a legitimate child and appellant-husband is his father and the allegations of adultery levelled by him against the respondent-wife are not proved.

18. Further, in the facts and circumstances on record, we do not find it a fit case to entertain the request of the appellant-husband that since they are not living together for the last more than five years, their marriage has broken irretrievably and no useful purpose would be served by not allowing his prayer for divorce. Granting divorce to the appellant-husband would mean giving him advantage of his own wrong and also the abuse of the process of law to enable the appellant-husband to get decree of divorce by levelling false allegations of adultery.

19. The result of above discussion is that there is no merit in this appeal and it is dismissed with costs assessed at Rs. 1,000/-.