

(2009) 07 KL CK 0027

In the High Court Of Kerala

Case No : Matrimonial Appeal No. 103 of 2003 (F)

Laila and Another

APPELLANT

Vs

Muhammedali

RESPONDENT

Date of Decision : 02-07-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Evidence Act, 1872 — Section 112, 4
Family Courts Act, 1984 — Section 7, 7(1)
Limitation Act, 1963 — Article 58

Citation : AIR 2009 Ker 173 : (2009) 4 ILR (Ker) 22 : (2009) 2 KLJ 793 : (2009) 4 RCR(Civil) 918 : (2009) 4 RCR(Criminal) 905

Hon'ble Judges : R. Basant, J;M.C. Hari Rani, J

Bench : Division Bench

Advocate : T. Krishnan Unni and Saju. S.A, for the Appellant; ESM Kabeer, for the Respondent

Judgement

R. Basant, J.

(1) Does the prayer for declaration of illegitimacy of a child born during the subsistence of a valid marriage fall within the sweep of explanation (e) to Section 7(1) of the Family Courts Act?

(2) Is the presumption of legitimacy u/s 112 of the Evidence Act available in favour of a child born within 209 days of the date on which access commenced between the spouses?

These are the crucial Questions that arise for consideration in this appeal.

2. The appellants are a divorced wife and her minor daughter. The marriage of the first appellant with the respondent took place on 24.6.1985. The child in question (the 2nd appellant) was admittedly born on 13.7.1994. The marital tie was dissolved on 17.8.1995.

3. Long later the respondent-husband alleged that he came to know that his

name has been entered in the records of the Local Authority as the father of the child. He called upon the Local Authority by Exhibit A4 lawyer notice dated 20.2.2001 to reverse the entry regarding paternity in the records. He received Exhibit A5 reply dated 24.3.2001 that it was not possible to do so. According to him, he then had a cause of action and he came to the court for a declaration that the child/second appellant herein is not a legitimate child born to him in his relationship with the first appellant herein,

4. The foundation of the claim for declaration is that the husband was working abroad and had come back to India only on 17.12.1993, 17.12.1993 is the earliest date on which possible access was there between the spouses for such pregnancy. The date of birth of the child is 13.7.1994. There was only a gap of 209 days. From this, he concluded that the child born during the subsistence of the matrimony is not at all begotten to him in the marital tie. Hence, he prayed for a declaration that the child is not his legitimate child,

5. The application was resisted on various grounds. It was contended that the husband has more than one passport and it is not correct to say that he was in India only on 17.12.1993 and thereafter. He was in India earlier. In these circumstances, it was contended that access was there even prior to 17.12.1993. It was further contended that at any rate the presumption u/s 112 of the Evidence Act applies and continues to remain in force. Legitimacy of the child born in such relationship must be conclusively presumed u/s 4 of the Evidence Act, it was contended.

6. Parties went to trial on all these contentions. On the side of the respondent/petitioner, a Doctor, who attended on the first appellant for the delivery was examined as PW1, The respondent herein examined himself as PW2. The first appellant examined herself as RWI While Exhibits A1 to A8 were marked on the side of the respondent, through PW1 Doctor, Exhibit XI case sheet was also marked, Before the court below, there was a prayer that the parties may be permitted to undergo a DNA finger printing test". That prayer of the respondent herein was not allowed, in view of the opposition of the first appellant.

7. The court below on an anxious consideration of the relevant inputs came to the conclusion that the child could not have been begotten on or after 13.12.1993 and consequently, it was held that the presumption u/s 112 of the Evidence Act will not be available in favour of the appellants. Accordingly, the court proceeded to pass the impugned order.

8. Before us, the learned Counsel for the appellants and the respondent have advanced their arguments. The learned Counsel for the appellants assails the impugned order on the following three grounds.

(1). The court below must have held that the petition filed by the respondent is barred by limitation under Article 58 of the Indian Limitation Act.

(2) The court below ought to have held that declaration of illegitimacy cannot be

claimed or granted under explanation (e) to Section 7(1) of the Family Courts Act.

(3). At any rate the court below erred grossly in coming to the conclusion that the presumption u/s 112 of the Evidence Act does not apply and the same stands rebutted from the simple fact that there was only a period of 209 days between 17.12.1993, the date from which alone access could have been there and the date of birth of the child, i.e., 13.7.1994.

8. We shall now proceed to the three grounds raised.

9. Ground No. 1: The learned Counsel for the appellant contends that under Article 58 of the Limitation Act, to obtain any declaration, not specified earlier, three years is the period of limitation and such period of limitation starts when the right to sue first accrues. The counsel contends that if the appellant had any misgivings about the legitimacy of the child, the same must have been in existence on the date of birth of the child, i.e., 13.7.1994 or at least on the date of divorce, i.e., 17.8.1995. The right to sue must then be held to have accrued first at least on 17.8.1995. The proceedings have been initiated only in 2002 and in these circumstances, the prayer is barred by limitation, it is contended.

10. The learned Counsel for the respondent points out that this is not a plea which was raised before the court below or even before this Court in appeal. The counsel does not dispute the proposition that a plea of limitation can be raised even when pleadings are not there specifically. There can be no dispute on that proposition of law also, if the facts duly proved or admitted, clearly show that the claim is barred by limitation, notwithstanding the fact that the plea had not earlier been raised, the court at any stage is entitled to consider that plea. But, we find merit and accept the contention of the learned Counsel for the respondent that the clock of limitation can start ticking only when the right to sue first accrues. The question as to the date on which the right to sue accrues is a question of fact. The relevant facts have to be pleaded. Adversary must be given an opportunity to know, understand and meet the plea of limitation founded on a fact. Such a fact has to be pleaded. In this case, the right to sue first accrued not on the date when divorce was effected, but only on the date when the respondent received Exhibit A5 reply dated 24.3.2001 (in reply to Exhibit A4 notice dated 20.2.2001) refusing to reverse the entry in the birth register showing him as the father of the child. Till then there was no dispute on that aspect. In this context, the counsel for the respondent brings to the notice of the court Exhibit A2 agreement executed between the parties on 16.8.2000, the recitals in which clearly suggest that no dispute was raised even at that point of time about the respondent's responsibility for the second child born on 13.7.1994. According to the respondent's counsel, the first appellant had accepted that the respondent was not the father of the child,

11. We need only mention that the plea of limitation now raised, founded on a specific fact was not pleaded and the respondent did not have opportunity to join issue with the appellants on that aspect and adduce evidence. That being so, we

are satisfied that the plea of limitation raised now cannot be accepted. The challenge on Ground No. 1 hence fails.

12. Ground No. 2: The counsel for the appellants contends that proceedings for declaration as to legitimacy of any person alone can be taken cognizance of under explanation (e) to Section 7(1). According to the learned Counsel for the appellants, in the instant case, what is sought to be declared is not the legitimacy of the 2nd appellant, but her illegitimacy. The counsel contends that explanation (e) to Section 7(1) has to be construed strictly and the same cannot take in any proceedings for declaration of illegitimacy of any person. Hence, the very proceedings is not maintainable before the Family Court, contends the learned Counsel for the appellants.

13. The learned Counsel for the respondent on the contrary contends that the expression "declaration as to the legitimacy of any person" must necessarily include a declaration as to illegitimacy of such person also. In proceedings for declaration of legitimacy, the question whether the person is legitimate or illegitimate will certainly have to be considered and it would be idle to contend that the parties will have to approach the ordinary civil court and not the Family Court for a declaration of illegitimacy while a declaration of legitimacy can be granted by the Family Court. This contention does not stand to reason or logic, contends me learned Counsel for the respondent.

14. The learned Counsel for the appellants points out that it is now trite law that the declaration of illegitimacy cannot be granted by a Family Court u/s 7(1). The counsel relied on two binding precedents in support of this contention. He, first of all contends that the Hon'ble Supreme Court in *Renubala Moharana and Another Vs. Mina Mohanty and Others*, in paragraph 6 had made the following observations/conclusions and that must show that a proceedings for declaration of illegitimacy is not maintainable u/s 7(1).

6. The view taken by the High Court as regards the first prayer has been assailed before us. u/s 7(1) read with Clause (e) of the Explanation, a suit or proceeding for a declaration "as to the legitimacy of any person" is within the jurisdiction of the Family Court, According to the appellants, the child was born on account of extramarital relationship of Respondent 1 with their son, the late Samuel Maharana. Accepting the case of the appellants, the child cannot obviously be treated as a legitimate child of Samuel and Mina Mohanty (R-1). The question of status of the child in relation to the parties to the petition can be incidentally gone into by the Family Court if necessary while deciding the guardianship petition. That liberty has been granted to the Family Court. However, as rightly held by the Family Court and the High Court, the declaratory relief as regards the illegitimacy of the child cannot be granted. In effect, that is what the appellants want under prayer(a).

(emphasis supplied).

The learned Counsel for the appellant further relies on the decision in *Bharat*

Kumar v. Selma Mini 2007 (1) KLT 945 in which the dictum in Renubala is followed by a Division Bench of this Court,

15. The learned Counsel for the respondent submits that it would be myopic to understand the decision in Renubala as laying down the rigid proposition of law that dispute regarding illegitimacy or otherwise of a child born during the currency of a valid matrimony cannot be the subject matter of a proceedings between the spouses under explanation (e) to Section 7(1). The learned Counsel for the respondent points out that the decision in that case is valid only for the proposition that declaration as to legitimacy or illegitimacy of any person without any claim for marital relationship is not entertainable by the Family Court, as such a child born outside matrimony can never be legitimate. The learned Counsel contends that the facts in Renubafa's case have to be alertly evaluated and assessed to correctly understand the dictum laid down in Renubala's case. In this context, the counsel relied on paragraph 5 of Renubala's case to highlight the facts. He contends that the Supreme Court in that case was concerned only with the question as to whether declaration as to legitimacy of any person without any claim of marital relationship is entertainable by the Family Court. It will be totally erroneous and puerile to conclude . from the observations in paragraph 6 that a dispute between the spouses as to whether a child born in the matrimonial relationship between the parties is legitimate or illegitimate would not be maintainable u/s 7(1), A declaration either way can be sought by one of the spouses in respect of a child born during the currency of such matrimony, contends the learned Counsel. To highlight this aspect, counsel relies on the following observations in paragraph 5 in which the precise challenge which the Supreme Court considered in Renubala is highlighted.

5. After trial, the Family Court, by its judgment dated 2.5.2000 dismissed the petition on the ground that the petition itself was not maintainable in the light of Section 7 of the Family Courts Act As regards the prayer for guardianship, the learned Judge observed that Respondent 1 being the natural mother against whom there was no adverse allegation, there was no need to appoint any other person as guardian. On appeal to the High Court, the Division Bench of the High Court agreed with the conclusion of the Family Court that the first relief sought for by the appellants cannot be granted by the Family Court for the reason that declaration as to the legitimacy of any person without any claim of marital relationship is not directly entertainable by the Family Court. In view of the admitted fact that Samuel Maharana and Respondent 1 were not married, the child allegedly born through Samuel Maharana can never be a legitimate child.

(emphasis supplied).

16. The learned Counsel contends that the dictum in Renubala is only that declaration u/s 7(1) can only be regarding legitimacy and in the admitted absence of a marriage no declaration regarding legitimacy can be granted. Legitimacy presupposes a valid marriage. In the absence of a valid marriage, there can be no question of legitimacy or otherwise at all. A child born admittedly

outside matrimony in the extra marital relationship between the man and woman can never be legitimate. Dispute about paternity between such man and woman is not a dispute regarding legitimacy and such a mere dispute of paternity between a man and woman not united in valid matrimony is outside the sweep of Section 7(1). This is a!! what Renubala lays down, contends counsel. Renubala is not authority for the proposition canvassed by the appellants' counsel that a dispute between the spouses - validly married admittedly, regarding legitimacy/illegitimacy of a child born during such matrimony is beyond the jurisdictional competence of the Family Court, urges the learned Counsel Shri E.S.M. Kabeer. We find merit in this contention.

17. We extract Section 7 of the Family Courts Act below:

7. Jurisdiction: (1) Subject to the other provisions of this Act, a Family Court shall:

(a) Have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) Be deemed, for the purpose of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:

(a) A suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) A suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) A suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) A suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) A suit or proceeding for a declaration as to the legitimacy of any person:

(f) A suit or proceeding for maintenance,

(g) A suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise:

(a) The jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and (b) Such other jurisdictions as may be conferred On it by any other enactment.

18. The learned Counsel for the appellants has then placed reliance on the decision of a Division Bench of this Court in *Bharat Kumar v. Selma Mini and Anr.* 2007 (1) KIT 945. In that decision, the earlier decision of the Supreme Court in *Renubala* was considered and the dictum was accepted. In paragraph 4 of *Bharat Kumar's* case, the dictum of the Supreme Court is understood by the Division Bench as follows:

It may also arise in situations covered by explanation (g) of Section 7(1), as held by the Supreme Court in *Renubala Moharana and Another Vs. Mina Mohanty and Others*, , *Ranjit Kumar Bhowmik Vs. Subodh Kumar Roy and Others*, . It was also held by the Supreme Court in the said decision that the Family Court cannot entertain any proceedings for declaration as to the legitimacy of any person without any claim on marital relationship. In the case before us the petitioner before the Family Court, the first respondent herein, does not have a case of marital relationship with the petitioner herein. The case admittedly is of extra marital relationship. The dispute is with regard to the paternity of a child born in the said extra marital relationship. That is not a matter falling within the jurisdiction of the Family Court. Paternity of a child can be gone into as incidental to a dispute on the legitimacy arising only out of a claim on marital relationship between the parties. Such a question also may incidentally arise in deciding a guardianship petition. No such situation arises in this case.

19. We are persuaded to agree with the learned Counsel for the respondent that *Bharat Kumar* also supports his contention only. *Renubala* was a case where parents of Samuel, a deceased man, inter alia, sought a declaration that the child born to respondents 1 and 2 (spouses) during their valid matrimony is not the child of the second respondent/husband, but was that of Samuel, with whom the first respondent wife had alleged illicit extra marital relationship. Similarly, in *Bharat Kumar's* case also the woman and the child had sued for a declaration that though the marital tie with the second respondent subsisted, the first respondent in that case who had illicit relationship with the woman during her valid matrimony with the 2nd respondent was the father of the child. What is crucial to note is that a declaration of legitimacy can be granted only when there is admitted matrimonial relationship, Where matrimonial relationship is not there between the contestants, the dispute can be only about paternity and not legitimacy. Section 7(1) of the Family Courts Act does not cover a dispute regarding paternity by itself. It covers only a dispute regarding legitimacy of a child born. It is in that context that both the cases - *Renubala* and *Bharat Kumar* took the view that it is essential that there must be a matrimonial relationship to attract explanation (e) to Section 7(1). It will be interesting to note the very question framed for consideration in *Bharat Kumar's* case in paragraph 1, which

reads as follows:

Whether paternity of the child is an issue to be considered by the Family Court u/s 7(1) of the Family Court Act, 1984, without a matrimonial cause, is the question to be considered in this case.

The dictum in Renubala and Bharat Kumar properly understood, according to us is only that a mere dispute about paternity where there is admittedly no matrimony between the mother and the alleged father is not one that can be entertained u/s 7(1). Existence of valid matrimony is sine qua non for jurisdiction to entertain a proceedings u/s 7(1) of the Family Courts Act. When admittedly there is no matrimony, there can be no question of legitimacy and in such a situation no relief u/s 7(1) can be granted. That and that alone, it appears to us, is the dictum laid down in the two decisions. At least, it is evident that the Division Bench in Bharat Kumar understood the dictum in Renubala thus. We are in total and complete agreement with the view taken by the Division Bench in Bharat Kumar on the interpretation of the dictum in Renubala.

20. In these circumstances we take the view that the dispute between the first appellant and the respondent about the legitimacy/illegitimacy of the second appellant born admittedly during the subsistence of the marital tie is a dispute which can be taken cognizance of and adjudicated u/s 7(1) of the Family Courts Act. We take the view that a declaration of not only legitimacy but also illegitimacy of a child born to the mother can be granted u/s 7(1), provided the disputants have a claim to be legally wedded and the fact that they are legally married is admitted or proved. We reckon Renubala and Bharat Kumar as authorities only for the proposition that a mere declaration of paternity, when there is admittedly no valid matrimony between the father and mother is outside the sweep of Section 7(1) of the Family Courts Act. The challenge raised on Ground No. 2 must hence fail.

21. Ground No. 3: That takes us perhaps to the most crucial and relevant ground raised by the appellants. It will be only apposite for us to refer to Section 4 of the Evidence Act, which speaks about conclusive presumptions and their impact and play. We extract the definition of conclusive proof in Section 4 of the Evidence Act,

4. 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.

22. We shall now consider Section 112 of the Evidence Act which enacts the conclusive presumption regarding the legitimacy of a child born during the subsistence of marriage and 280 days thereafter. It reads as follows:

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.

(emphasis supplied)

23. The advent of science and technology, it is now trite, makes it possible to authentically ascertain whether a person is or is not the biological father of a child. Section 112 was enacted at a time when the advantage of science and technology on this aspect was not available. In the interests of the health, order and peace in society, certain axiomatic presumptions had to be drawn. The conclusive presumption of paternity u/s 112 of the Evidence Act is one such presumption. That a child born in valid matrimony is the child of the legally wedded husband of the woman who gives birth to the child was thus presumed conclusively u/s 112 of the Evidence Act. The proof of one fact alone could rebut the said presumption and that is non-access between the spouses. Precedents galore to show that sufficient, clinching and conclusive proof must be made available of such non-access to rebut the presumption u/s 112. Consequence of not drawing the presumption and permitting the rebuttal of the presumption is to bastardise a child born during valid matrimony and that explains why the law leans in favour of the presumption of legitimacy when the child is born during matrimony or 280 days thereafter, the wife remaining unmarried.

24. An analysis of the provisions of Section 112 clearly shows that the presumption is available if it is simply shown that there was a valid marriage and the child was born thereafter till termination of the marriage or 280 days thereafter. It is not as though the presumption is not available if the child is born on the first day or the first week or the first month after marriage. The presumption literally applies if the child is born at any time after the marriage and before the elapse of 280 days from the termination of marriage, the mother remaining unmarried. The expression, "mother remaining unmarried" is according to us crucial, because the law appears to have assumed that if the mother remarries and the birth of the child is thereafter, the presumption of legitimacy u/s 112 can apply not to the previous husband, but to the husband legally married to her before the birth of the child, That is the only manner in which Section 112 can be understood. The presumption of legitimacy applies even if the child is born immediately after marriage, unless non-access to each other at the time when the child could have been begotten is proved. It is crucial that there is no exclusion u/s 112 of any initial period of matrimony to attract the conclusive presumption. The conclusive presumption u/s 112 read with Section 4 comes into play from the date of marriage. The legislature which extended the period of operation of the presumption by 280 days after dissolution of marriage did not, it is significant choose to exclude any minimum initial period of matrimony for the application of the presumption.

25. Even for a child born immediately after marriage, presumption of legitimacy u/s 112 would apply. But the same can be rebutted by showing that prior to the

marriage there was no possibility of access between the spouses.

26. The existence of the presumption for a further period of 280 days after the dissolution of marriage subject only to the condition that the mother has remained unmarried, does also show that the presumption is to apply so long as the marriage is subsisting and for 280 days thereafter. The period of 280 days is fixed obviously because the law presumes safely that a child is not likely to remain in the womb at any rate beyond 280 days. It would be idle to conclude that law assumed that 280 days is the minimum period of gestation for ascertaining the time when the child "could have been begotten" u/s 112.

27. We now come back to the facts of the case. The child was admittedly born during the subsistence of the matrimony which remained from 24.6.1985 to 17.8.1995. The child was born on 13.7.1994. The presumption u/s 112 must hence squarely apply. The only question is whether non-access of the spouses to each other is proved at any time when the child could have been begotten.

28. That takes us to the question as to when the child could have been begotten. Notwithstanding the valiant efforts of the first appellant, it is now evident that they could not have had access to each other prior to 17.12.1993. From 17.12.1993, the spouses had access to each other. It is submitted that the respondent/husband had returned to his place of employment on 1.2.1994. From 17.12.1993 to 1.2.1994 spouses had opportunity for access and did admittedly have access. The wife had conceived and the husband appears to have been under the impression, without any doubt, that it was his own child. Only after the child was born on 13.7.1994, does he appear to have entertained reservations about the legitimacy of the child or his responsibility for the conception.

29. Could the child born on 13-7-1994 have been begotten on and after 17-12-1993 is the only question that remains for consideration. The burden, undoubtedly, is on the respondent to show that the child could not have been begotten on account of the access/intercourse on and after 17.12.1993. That burden rests squarely on the shoulders of the respondent.

30. Has he discharged the burden? We have evidence to show that it was a normal delivery. But was the child a full grown child or not? There is no specific evidence either way. PW1 was examined. Exhibits A1, A1(a) and XI have been pressed into service. Exhibit A1 and A1(a) definitely support the case of the first appellant. Those documents show that LMP was on the 27th of December, 1993. On 4.2.1994 when the first appellant was examined by PW1, the prescription shows that the foetus was 14 weeks old and on 28.5.1994 when the first appellant was examined by PW1, the foetus was 20 weeks old. These entries in Exhibits A1 and A1(a) are absolutely consistent with the first appellant's case that she had conceived on account of the intercourse on and after 17,12.1993. The evidence of PW1 suggests that assessment of age of the foetus clinically (as shown in Exhibits A and A1(a)) can vary for a period of three weeks.

31. It is significant that not one question was put to PW1 that the child (2nd

appellant) could not have been begotten/conceived on account of the access/intercourse on and after 17.12.1993. That to our mind is crucial. It is unquestionable that the burden must rest heavily on the shoulders of the respondent to show that the child born on 13.7.1994 as per Exhibit XI, though in a normal delivery could not have been begotten from the intercourse/access on or after 17.12.1993, We have gone through the evidence of PW1 and Exhibits AI, AI(a) and XI and all other evidence. There is absence of any semblance of evidence to establish conclusively that the child born after a normal delivery at the Hospital on 13.7.1994 going by its features perceived by PW1 and others could not have been begotten as a result of intercourse/access on or after 17.12.1993. For that simple reason, the appeal must succeed and the proceedings initiated by the respondent must necessarily fail.

32. When could the child have been begotten? How many days must elapse between the date of conception and a normal delivery of the child? It appears to be difficult to specify any definite period. Courts had occasion to consider the very same question earlier several times. We may advantageously refer to paragraph 11 of the judgment of the Supreme Court in Smt. Dukhtar Jahan Vs. Mohammed Farooq, .

11. Examining the matter, we feel the learned Judge has failed to view the case in its entire conspectus and this has led to miscarriage of justice. On the sole ground that the child had been born in about 7 months" time after the marriage it cannot be concluded that the child should have been conceived even before the respondent had consummated the marriage. Giving birth to a viable child after 28 weeks" duration of pregnancy is not biologically an improbable or impossible event, In "Combined Textbook of Obsterics and Gynaecology" by Sir Gugald Baird 7th edn. At page 162 it is reported as under:

In the case of Clark v. Clark. (1939) P. 228 an extremely small baby, born alive 174 days after last possible date when intercourse with the husband could have taken place, and which survived, was held to be legitimate. While it is most unusual for babies of this weight or gestation period to survive it does occasionally happen...

The learned Judge ought not, therefore, to have rushed to the conclusion that a child born in about 7 months" time after the marriage of the parents should have necessarily been conceived even before the marriage took place, Insofar as the second aspect is concerned, viz. about the appellant"s statement that the child was not born prematurely, the High Court has failed to bear in mind that the appellant is a rustic and illiterate woman and as such her opinion could suffer from error of judgment.

33. The wife did not agree for the DNA test. This circumstance is used against her to contend that an adverse inference must be drawn. The DNA test is an authentic test and hence her failure to take that test must persuade the Court to draw an adverse inference against her. In the light of the giant leaps which

science and technology have made in the area/zone of identification of the biological father, the presumption u/s 112 can be criticised as anachronistic. The presumption u/s 112 may be shivering in its shoes. The legislature may intervene on a later date and modify the presumption u/s 112 and make it only one of the "may presume" or "shall presume" variety u/s 4 of the Evidence Act. It may not continue for a long time as a conclusive presumption. But that is the domain or realm of legislation. At what point of time in the development of a society, and its scientific and technological capabilities that presumption can be dispensed with or rigour of that presumption can be reduced is certainly to be considered by the legislature and not by a court interpreting a legislation. We must alertly note that there is no challenge before us against the constitutionality of Section 112 on the anvil of Articles 14 and 21 of the Constitution on the ground that the statutory stipulation is not fair, just and reasonable and is arbitrary, capricious, unjust and oppressive. In the post Maneka Gandhi era such a challenge does not appear to be impossible. We need only say that such a challenge is not raised before us or considered by us. As the law now stands in a case where Section 112 applies and non-access is not pleaded and proved, even a negative DNA test report cannot help to rebut the presumption drawn u/s 112 of the Evidence Act. The unwillingness by the wife to undergo the DNA test cannot hence tilt the scales against her.

34. We need not repeat the anxiety of the courts to avoid bastardisation of children born in valid matrimony unless there be convincing and compelling reasons. We are unable to find any such compelling and convincing reasons in the case. Of course, it may not be inapposite to note that some doubts are raised in the mind of the court about the attitude/stand of the spouses about the paternity/legitimacy of the child. We say so because Exhibit A2 divorce deed is significantly silent about the second child born on 13.7.1994. But that dissatisfaction/inadequacy is certainly insufficient to dislodge or rebut the conclusive presumption available u/s 112 as defined u/s 4 of the Evidence Act. Lingering vague doubts in the mind of the courts are not sufficient to dislodge the presumption u/s 112. For the reason that it has not been established that the child could not have been begotten on account of the relationship between spouses on and after 17.12.1993, this appeal is to succeed and the prayer of the respondent must be rejected.

35. In the result.

(a) this appeal is allowed.

(b) the impugned order passed by the Family Court is set aside.

(c) the parties shall suffer their respective costs.