

(2018) 03 JH CK 0003

In the Jharkhand High Court

Case No : Appeal from original Decree No. 121 of 2017

SUMAN PRAKASH @ SUMAN MUNDU

APPELLANT

Vs

SMT. DIVYA LALITA

RESPONDENT

Date of Decision : 12-03-2018

Acts Referred:

Indian Divorce Act, 1869 — Section 10
Code of Criminal Procedure, 1973 — Section 125
Indian Evidence Act, 1872 — Section 112

Citation : (2018) 03 JH CK 0003

Hon'ble Judges : APARESH KUMAR SINGH, J; RATNAKER BHENGRA, J

Bench : Division Bench

Advocate : Saibal Mitra, Shalini Kumari, J.J. Sanga

Final Decision : Dismissed

Judgement

1.Â Heard learned counsel for the parties.

2. This appeal is directed against the judgment dated 24th March, 2017 passed in Original Matrimonial Title Suit No. 130 of 2008 by the learned

Principal Judge, Family Court, Ranchi whereunder the matrimonial suit instituted by the plaintiff-petitioner/husband/appellant herein for a decree of

divorce under section 10 of the Indian Divorce Act, 1869 has been dismissed on contest, with a cost of Rs. 2000/- .The consequent decree is dated

03.04.2017.

As per case of the petitioner/appellant, the marriage between the parties was solemnized on 25th October, 2001 at St. Mary Cathedral Church, Ranchi

according to Christian rites and customs. The petitioner alleged that his wife did not give up her habit of leaving the matrimonial house without consent,

despite request and insistence. They did not mix up with each other after

November, 2002. She voluntarily left the matrimonial home on 30.01.2003.

She came back on 10.04.2003 and abused the petitioner in dirty language and demanded money for herself and, thereafter, left the house on the same

day. On 7th May, 2003, she came to her matrimonial house to attend Shradh karm of her mother-in-law and started vomiting thereafter. Though she

did not agree for medical checkup, on some pretext or other, she was taken to doctor for medical checkup where it was found that she was

carrying pregnancy of 65 days. Petitioner denied the baby born to the respondent. Ultra sound report also confirmed that she was pregnant. Medical

reports were reportedly attached to the petition but not adduced as evidence. The matter was raised before the Panchayat who advised the petitioner

to go to the authority of Church. He submitted a complaint before the Church. However, thereafter approached the court for decree of divorce on

these grounds, asserting that the cause of action arose on 15th November, 2002.

3. The respondent-wife, in her written statement, denied the allegations as being false, frivolous and fictitious. The suit is misconceived and not

maintainable and suffers from non-joinder and misjoinder of the party. Parawise reply to the complaint was also furnished where she also alleged that

she was forced by the petitioner to leave the matrimonial house on non-fulfillment of demand of Rs. 2.5 lacs. The petitioner used to come in drunken

condition late at night. According to her, she had gone to doctor with her sister and not with the Bhabhi. A daughter Sephali was born out of the

wedlock of the parties. At para 35, she also stated that if any further dispute arose with respect to the daughter she and her daughter should be sent

for DNA test which will make the situation clear. She alleged that the petitioner wanted to get rid of the respondent because of the reasons best

known to him. Moreover, due to nonfulfillment of demand of dowry on behalf of her poor family, those insinuations have been made.

4. Eight witnesses were examined on behalf of petitioner, namely:-

i. P.W. -1 Monika Mundu

ii.-P.W. 2 is Raju Baraik

iii.-P.W-3 is Sanjay Kumar

iv.- P.W.-4 is Jitendra Kumar Jaiswal

- v.- P.W. -5 is Vipul Bhengra
- vi.- P.W.-6 is Nirali Mundu
- vii.- P.W.-7 is Rina Regina Mundu
- viii.- P.W.-8 is Suman Mundu

5. The respondent has examined the following witnesses:-

- i. R.W.-1 is Divya Lalita Barla (Mundu), the respondent herself.
- ii.- R.W.-2 is Magdali Dhan, neighbor of the respondent iii.-R.W. 3 is Soni Sabita Barla, sister of the respondent

6. It is also true that a female baby was born to the respondent on 11.12.2003 within the continuance of the valid marriage between the parties.Â

7. The learned family court framed following four issues for determination on the basis of pleadings of the rival parties.

- i. Whether the suit is maintainable in its present form?
- ii. Whether the petitioner has valid cause of action for the suit?
- iii. Whether the respondent treated the petitioner with cruelty and deserted him?
- iv. Whether the female Baby Shifali was born out of the wedlock of the parties to the marriage or is outcome of adultery, if any? 8.Â Issue No. 4

regarding the adultery was answered against the petitioner after discussion of the evidence adduced by him. The learned court analyzed the evidence

on record and made reference of the chronology of dates to arrive at an opinion that plea of infidelity in marriage against the respondent/wife was not

made out. Petitioner in his deposition at para 27 had clearly stated that the respondent/wife stayed in his house till 31st January, 2003, contrary to his

assertion in the plaint that they had last resided till November, 2002 as wife and husband. The petitioner also admitted that the defendant/wife had

come to the matrimonial home on 10.04.2003 and stayed there for some time and abused him and had returned on the same day. He also accepted

that she had come for shradh karm of his mother performed on 07.05.2003. She, in fact had stayed till 12.05.2003 as per the petitioner's

statement. No documentary evidence of her medical checkup, ultrasound report etc. were adduced as evidence, despite assertion in the plaint. No

paper of panchyati was brought on record to support the submission relating to panchyati.Â

9. P.W. 6 also, for that matter, supported the case of the petitioner on the point

of visit of the wife to the matrimonial house on 10.04.2003 and

07.05.2003. He is the cousin brother of the petitioner. There are contradictions in the statement of P.W. 1 who is Bhabhi of the appellant as compared

to that of the petitioner and P.W. 6 in the sense that she stated that the defendant after performance of the shradh karm of her mother-in-law, left the matrimonial house, whereas petitioner and P.W. 6 had stated that she was in his house up to 12.5.2003.

10. R.W. 1 in her deposition had stated that they lived as wife and husband till March, 2003. At para 43, she stated that despite quarrel between them,

they were in physical relationship and she always allowed her husband to establish physical relation with her. At para 44, however, she stated that she

does not remember the day and dates. She had filed a Maintenance Case No. 13 of 2008 under section 125 of the Cr.P.C. after filing of the

matrimonial suit by the petitioner/husband. She denied that her daughter had been born after 12 months of her physical relation with her husband.

Evidence of R.W. 2 was not found admissible as a hearsay evidence. R.W. 3 denied that the parties were living separately since November, 2002 and

not from 2003. She denied that after November, 2002, they did not share bed.

11. The learned family court referred to the provisions of section 112 of the Evidence Act and the legal presumptions attached to the legitimacy of the

child born during a valid marriage unless it can be shown that the parties had no access to each other at any time when the child could have been

begotten. The learned family court accordingly refused to accept the plea of adultery raised by the petitioner to decree divorce in his favour. On the

other two grounds of cruelty and desertion framed under issue No. 3, it came to the conclusion, on the basis of pleadings and evidences on record, that

the petitioner neither pleaded nor led evidence that respondent had voluntarily deprived him from matrimonial relation and committed mental cruelty

upon him by desertion. This issue was accordingly also answered against the petitioner/ husband.

12. Learned counsel for the appellant has assailed the findings of the learned family court on the point of adultery mainly on the following

submissions:-

i. That the appellant /husband had categorically asserted in the plaint and led evidence in support thereof that there was no physical relationship with

the respondent wife after November, 2002. The paternity of the child born to the respondent in December, 2003 is, therefore, in serious doubt.

ii. The respondent at para 21 and 35 to the written statement had acceded to undergo DNT test. There was no reason for the learned family court to

refuse sending the child and the petitioner for a DNA test which could scientifically determine the paternity of the child and conclusively establish the

allegation of adultery. The learned family court had earlier refused the prayer for subjecting the petitioner and the respondent's daughter for DNA

test which was challenged by the husband in WP(C) No. 56 of 2012 before this Court. Liberty was granted by the learned Single Judge vide order

dated 04.02.2015, to move such an application after the witnesses of the plaintiff had been examined. The learned family court on being moved again,

declined to order DNA test of the petitioner and the respondent's daughter by order dated 20th September, 2016 without any valid basis.

iii. The learned counsel has copiously relied upon the judgment of Hon'ble Apex Court in the case of Nandlal Vasudeo Badwaik Vs. Lata Nandlal

Badwaik & Anr reported in 2014(1) JLJR (SC) 423 para 4 & 21. He has also relied upon a judgment rendered by the Hon'ble Apex Court in the

case of Dipanwita Roy V. Ronobroto Roy reported in AIR 2015 SC 418, para 10,11 & 12 thereof. Relying upon these judgments, he submits that the

law has evolved now, in respect of use of DNA test to determine the paternity of a child in a matrimonial suit instituted on the allegations of infidelity.

Interest of justice would be served only if such a course is adopted in the present case also. He submits that the Apex Court has observed that Section

112 of the Evidence Act was framed at a time when there was no DNA test available. However, when there is a clear assertion of adultery, the

presumption of legitimacy of a child would be best answered by subjecting the petitioner and the child to a paternity test. More so, when the

respondent had herself conceded to such an approach. Based on these submissions, learned counsel for the petitioner has sought interference in the

findings of the learned family court.

13. Learned counsel for the respondent submits that mere allegation on the part of the appellant/husband without any cogent proof to substantiate that

he had no physical relationship with his wife during that period would in itself be insufficient to establish the charge of adultery when even the name of

the adulterer male could not be mentioned by the husband nor such person has been impleaded as party. The pleadings on record and those made in the plaint itself demolish the allegation of the appellant/husband as admittedly the respondent/wife had left the matrimonial home on 31.01.2003 and again came on 10.04.2003 before she last came on 07.05.2003 at the time of Shradh Karm of her mother-in-law and lived up to 12.05.2003. There was access between the spouses all through. Therefore, the presumption attached to the legitimacy of the child born during the validity of the marriage under section 112 of the Evidence Act has not been successfully rebutted. He submits that a very high standard of proof is required in terms of degree higher than the standard of preponderance of probabilities on the part of the husband to rebut the presumption attached under section 112 of the Evidence Act. The learned family court had justifiably refused to order DNA test in such case. He further submits that the statements made by the defendant in her written statement would only be taken in a manner that the lady was trying to vindicate her self-respect in any such eventuality arising in case of question mark to the paternity of her child. However, the husband had to cross the test under section 112 of the Evidence Act before such a DNA test could have been ordered. He submits that the judgments of the Honâ??ble Apex Court have also advised caution in such matters as there is apparent conflict between the right to privacy of a person and the duty of the court to reach the truth. The court has to exercise its discretion only after balancing the interest of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. In those circumstances, the ratio rendered by the Honâ??ble Apex Court on the question of DNA test in the matters related to matrimonial dispute do not come to the aid of the appellant in the facts of the present case. The impugned judgment is well reasoned, therefore, no interference is warranted.

14. We have considered the submissions of learned counsel for the parties at length; gone through the relevant materials; evidences on record; judgments cited by counsel for the parties and also perused the impugned judgments. Before proceeding to delve into the grounds of challenge raised by the appellant on the findings relating to the adultery, we are disposed to quote the provision under the Evidence Act i.e. Section 112 which deals

with the legitimacy of a child born during the subsistence of a valid marriage:-

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.

15. The Apex Court in the case of Dipanwita Roy (supra) had the occasion to deal with the rival contention of the parties on the question of directing the DNA test in the light of the provision of section 112 of the Evidence Act; and the precedents on the subject i.e. in the case of Kamti Devi V.

Poshi Ram reported in AIR 2001 SC 2226, Sham Lal alias Kuldeep V. Sanjeev Kumar and others reported in (2009)12 SCC 454, Sharda V.

Dharmpal reported in (2003)4 SCC 493 and that of Bhabani Prasad Jena V. Convenor Secretary, Orissa State Commission for Women and another

reported in (2010)8 SCC 633. The Hon'ble Apex Court in these judgments had observed that Section 112 of the Evidence Act requires strong

prima facie case on the part of the husband to establish non-access in order to dispel the presumption arising thereunder. The party who wants to

escape from the rigour of the conclusiveness attached to the presumption has to show that he had no access with each other at the time when the

child could have begotten. The party trying to rebut the presumption had the burden to show the negative, not merely that he did not have the

opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Even though, Section 112 of

the Evidence Act was enacted at a time when the modern scientific advancements with DNA as well as RNA were not even in contemplation of the

legislature and that now a result of the genuine DNA test can be said to be scientifically accurate, but even that is not enough to escape from the

conclusiveness of Section 112 of the Act. The burden of the plaintiff-husband should be higher than the standard of preponderance of probabilities.

The standard of proof in such cases must at least be of a degree in between two as to ensure that there was no possibility of the child being conceived

through the plaintiff husband.

16. In the case of Sham Lal alias Kuldeep (Supra) Hon'ble Apex Court had observed that once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access. The Hon'ble Apex Court took note of the observations made by it earlier in the case of Bhabani Prasad Jena (Supra) relating to the DNA test and observed that an extremely delicate and sensitive aspect is involved while resorting to the DNA test in judging the issue before the court relating to legitimacy of the child. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. The Hon'ble Apex Court was of the view that when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed.

17. In the case of Goutam Kundu Vs. State of West Bengal reported in (1993)3 SCC 418 and Sharda Vs. Dharmपाल reported in (2003)4 SCC 493 it was held that the courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test.

18. In Sharda (Supra) it was also observed that the court should exercise such a power if the applicant has a strong prima facie case and there should

be sufficient material before the court before such a DNA test is ordered.Â

19. In the case of Dipanwita Roy (Supra) the order directing DNA test by the High Court was under challenge. The Honâ??ble Apex Court after

dealing with the precedents on the subject, left it to the wife to comply with or disregard the order passed by the High Court, requiring the holding of

the DNA test. In case, she accepted the direction, the DNA test will determine conclusively the veracity of accusation levelled by the respondent

husband against her. In case she declines to comply with the direction the allegation would be determined by the concerned Court, by drawing a

presumption of the nature contemplated in Section 114 of the Indian Evidence Act. This course was adopted to preserve the right to individual privacy.

Of course without sacrificing the cause of justice. The Apex Court finally observed that the issue of infidelity alone would be determined without

expressly disturbing the presumption contemplated u/s 112 of the Indian Evidence Act. Even though, undoubtedly the issue of legitimacy would also be

incidentally involved.Â Â Â Â Â Â Â Â Â Â Â

20. We have consciously copiously relied upon the opinion of the Honâ??ble Apex Court in matters relating to determination of paternity of a child by

a DNA test in a matrimonial dispute. In the present case, the evidence on record and the admission of the appellant/husband unmistakably show that

the wife had stayed in his house till 31.1.2003 and again came on 10.4.2003 and after abusing him went aback. She again came to his house on

7.5.2003 to perform shradh karm of her mother-in-law and left the house on 12.5.2003. The appellant on suspension of pregnancy noticed due to

symptoms manifested in the first few weeks of the pregnancy got, the respondent also examined by a doctor and undertook her to ultrasound test. As

per the case of the appellant the doctor found her carrying a foetus of 65 days. However, no documentary evidence was adduced relating to medical

examination or ultrasound on the part of the appellant, though assertion to that effect were made in the plaint.Â These evidences on record clearly

show that the appellant and the respondent wife had access to each other during the period when the pregnancy was conceived. The appellant,

therefore, miserably failed to rebut the conclusiveness attached u/s 112 of the Evidence Act relating to the legitimacy of a child born during the

subsistence of a valid marriage.Â On failure to rebut the presumption created in

law the prayer for DNA test to establish the paternity of the child was rightly declined by the Family Court. Moreover, the appellant had even failed to name the person who was alleged to be an adulterer with the respondent/wife.

21. Considered thus, we do not find any reason to disturb the findings of the learned Family Court. Consequently the appeal fails and is accordingly dismissed. Decree accordingly.Â Â Â Â Â Â Â