(1997) 09 KL CK 0025

High Court Of Kerala

Case No: O.P. No. 226/95 B (Divorce)

P.V. Sabu — APPELLANT

Vs

Mariakutty — RESPONDENT

Date of Decision: Sept. 4, 1997

Acts Referred:

- Divorce Act, 1869 - Section 19
- Evidence Act, 1872 - Section 112

Citation: AIR 1998 Ker 86 : (1998) 1 CivCC 87 : (1998) 1 DMC 198 : (1997) 4 RCR(Civil) 679

Hon'ble Judges: C.S. Rajan, J

Bench: Single Bench

Advocate: N. Baby George and T.K. Koshy, for the Appellant; K.K. Chandran Pillai, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

C.S. Rajan, J.

This is a petition filed by the husband praying for a decree declaring that the marriage between the petitioner and the respondent is a nullity u/s 18 of the Indian Divorce Act. The allegations as per the amended Original Petition are as follows :

The petitioner and the respondent married on 3rd September, 1992. The marriage was an arranged one. After the marriage the petitioner and the respondent lived in the house of the petitioner for two weeks. Thereafter the respondent went to Bombay to rejoin duty as a Nurse. After four months of the marriage the petitioner got an employment in Saudi Arabia. On 25-3-1993 the petitioner received a telephone call informing that the respondent delivered a child at Bombay hospital where she was working. It was a normal delivery and the child was fully grown up. Then the petitioner made enquiries and he came to know that the respondent was nant at the time of the marriage. On further enquiries it was revealed that the

respondent went to Bombay earlier in search of employment along with one Koshy and she was residing in the house of the above Koshy. She developed an illegal intimacy with himand she became pregnant through him. The respondent was having about three months pregnancy at the time of the marriage. If the petitioner had any knowledge about it, he would not have married her. Thus the petitioner''s consent for the marriage was obtained by fraud concealing the fact of pregnancy. There is also no collusion between the petitioner and the respondent.

2. The respondent has filed a counter-affidavit. According to the counter-affidavit the petitioner and the respondent knew each other before the marriage and they were in love. The petitioner came to Bombay on two occasions, in the months of May and July, 1992. On those occasions they stayed together in a hotel at Bombay and the respondent "submitted everything to him as instigated by him". As a result of the above relationship which they had, the respondent became pregnant. The delivery was not a normal one; it was a Caesarean. After delivery the respondent came to her house. The baptism ceremony took place with the blessings and cooperation of the parents of the petitioner. After some time the petitioner''s attitude towards the respondent began to change gradually. He was asking questions as to how the delivery was premature. He also informed the respondent that his parents and relatives were having suspicion about the premature delivery. The respondent never felt that the two meetings in the hotel at Bombay "had created any danger in her". The petitioner also requested the respondent to write letters to him in which the respondent must describe how she was raped by taxi drivers and that she had some illicit intimacy with her relative.
At that time she did not know the evil motive of the petitioner that these letters would be used against her in these proceedings. The respondent also executed a document styling as the divorce document at the threat of the petitioner, to save her job which she was having in Saudi Arabia. The respondent is also categoric in denying that she was pregnant by three months at the time of their marriage.

3. A detailed reply affidavit has been filed by the petitioner. The story of staying at a hotel in Bombay has been denied in the reply affidavit. The version of the respondent that the letters were written as requested by the petitioner was also denied.

4. The petitioner was examined as PW 2. The respondent has been examined as D.W. 1. Several documents have been marked on both sides which include letters and photographs.

5. The following issues have been framed by the Court :

"1. Whether the respondent was pregnant at the time of marriage?

2. Did not the respondent commit fraud by concealing the fact of pregnancy from the petitioner at the time of marriage?

3. Was not the consent of the petitioner for the marriage with the respondent obtained by fraud?

4. Whether the petitioner had access to the respondent at the time when the respondent could have conceived the child?

5. Is not the petitioner entitled to a decree declaring that the marriage between the petitioner and the respondent is a nullity?"

6. Issue No. 1 : This is the crucial issue to be decided in thiscase. Ext. P-1 is the birth certificate issued with regard to the date of birth of the child. The date is 25-3-1993. Ext. P-1 is based on the confinement register of the hospital. The relevant page of the above register certified by the Notary has been marked as Ext. P-2. The photocopy of the same has been marked as Ext. P-2(a). Ext. P-2 shows that the respondent (Mrs. Mariakutty) delivered a male child on 25-3-1993 at 3.58 hours. The child weighed 3.80 kgs. It further shows that the respondent had completed 38 weeks out of 40 weeks of her pregnancy. Ext. P-3(a) is the ante natal record of the respondent.

The menstrual history is 34 days/30 days. LMP is 26-7-92 and the expected date of delivery is 3-4-1993. PW 1, the Deputy Medical Superintendent of the Bombay Hospital was examined to prove these documents. He has deposed that Exts. P-1, P-2 and P-3 are documents regularly kept in the office of the hospital. He has also testified that it was a full term delivery. It is also stated by him that these documents are in his custody. The witness also denied the suggestion that there was chance of manipulation in Exts. P-2 and P-3. He has further stated that the staff of the hospital will have no access to the records without the permission of the medical administration.

7. The respondent when examined as D.W. 1 has admitted that the LMP mentioned in the hospital record was based on the information passed on by her. The gestation of the child was also mentioned in the hospital records based on that date. The respondent has also stated that at the time of the marriage, she was not aware that she was pregnant because she had irregular menstruation. When she consulted a lady doctor in Bombay she told the doctor in the presence of the petitioner that her LMP was in the second week of July, 1992.

8. Thus it has come out in evidence that the respondent delivered a child after 203 days calculating from the date of the marriage, i.e., 29 weeks of the marriage and just in about 7 months. Though the respondent has a case that it was a premature delivery, the records do not disclose that it was a premature delivery. As indicated earlier, out of the 40 weeks of gestation, she has completed 38 weeks. Moreover, the child weighed 3.80 kgs. Though the respondent has a case that the child was put in the incubator for some days, there is no evidence to that effect. If that was the case, definitely Ext. P-3 hospital records would have shown the above fact. Ext. P-2 shows that another child which was born after 38 weeks and which weighed only

2.80 kgs. was not transferred to the incubator. Children born after 36 and 37 weeks were also not transferred to the incubator. At the same time, a child which was born after 32 weeks and which weighed only 1.1 kgs. was transferred to the incubator. Therefore it is not possible to accept the version of the respondent that her was a premature delivery. Calculating the months and days of the pregnancy on the basis of the LMP and the date of delivery, it can only be presumed that respondent was pregnant at the time of the marriage.

9. Issue No. 4: This is the most controversial issue in this case, on which much was said and argued by both sides. The petitioner was categoric: in the petition, as well as in the reply affidavit that he never knew the respondent before marriage. That is why he examined P.W. 3 the Kapiar of the Church who mediated the marriage. According to PW 3 it is the brother of the respondent who approached him for an alliance for his sister. Though the two families belonged to the same parish at a time, the parish was bifurcated about 30 years ago and the respondent''s family belonged to the above parish. A suggestion was put to the witness by the respondent that the petitioner and the respondent had prior acquaintance or love affair. He denied the above suggestion stating -that their marriage was not out of the love affair developed between them. Though the case of the respondent is that it is the petitioner who solicited the good office of PW 3 for the marriage, no question was asked to PW 3 regarding the above fact. PW 3 was a Kapiar in the church for the last 32 years and I do not find any reason to disbelieve the version of. PW 3 that it is he who was responsible for arranging the marriage.

10. The further case of the respondent is that the petitioner and the respondent were studying in the same school and they knew each other. Later they were studying together in a typewriting institute. According to the respondent they fell in love while studying in the school and the affair progressed later at the typewriting institute. Apart from the interested testimony of the respondent, there is nothing to show that they had previous acquaintance. The petitioner has categorically denied the above fact of previous intimacy. Therefore I am unable to accept the version of the respondent that they were in love previous to the marriage and that their marriage was a love marriage as far as they are concerned and an arranged marriage as far as the relatives are concerned.

11. Another important factor which has to be considered by this Court is the case of the respondent that they were in a hotel at Bombay for two days in May, 1992 and July, 1992.

According to the respondent, as stated in the counter-affidavit, when the petitioner came for the second time he came to Bombay and they had occasion to reside together for two days in a hotel --one day in the month of May and another day in the month of July, 1992. On these days it so "happened that "the respondent submitted every thing to the petitioner as instigated by him". With regard to the above incidents the version of the respondent while in the box is as follows :

"....Thereafter in May, 1992, the petitioner came to Bombay to meet me. He had come to my hostel. Both of us went out to a hotel. I had written in the concerned register with permission. We had talked each other regarding our marriage. We decided that our marriage shall be solemnised when I go to my native place on leave. When we went outside, we resided in a hotel near the hostel. We were there for about 3 hours. There was none else in the room. I conceded myself fully to the petitioner. It was because we agreed each other to get married. The petitioner thereafter went to his native place. He again came to Bombay in July, 1992. He came to the hostel at that time also. Both of us went outside from the hostel during my off-day hours. We went to the same hotel. After about 3 hours, he took me to the hostel. Had there been sexual relationship on that day (Q), (A) On that day also, there was sexual relation."

During cross-examination on the above aspect, the respondent stated as follows :

"....We had been in a hotel alone and it is at that time the suggestion of marriage was mooted. I do not know the name of the hotel, the petitioner knows it. Both of us lived in a hotel in the first week of May and the second week of July, 1992. I cannot remember the correct date. The suggestion that there was no such incident in the life of the petitioner is not correct. I do not go outside while living in Bombay."

When the respondent was further questioned about the petitioner''s visits to Bombay she has deposed as follows :

"Q. I say that the petitioner had never visited Bombay in the months of May and July 1992. (A) No, he had visited Bombay during the said months. (Q) Can you produce any document to show that you had been in hotel along with the petitioner before marriage? (A) It can be seen from the hostel records that I had gone outside with the petitioner. It was after coming down from the hostel that the petitioner suggested to go to hotel. (Q) I say that the petitioner had never visited Bombay in May and July (A) He had visited (Q) Why did you not produce the hostel records?

(A) I did not go to Bombay after my recent visit to India to take those records.

(Q) I say that there was no record as you said? (A). No it is not correct."

12. According to the respondent the hotel, in which the petitioner and the respondent stayed to spend time together for about 3 hours on 2 days on two occasions is nearby her hostel. Still she says that she does not know the name of the hotel. It is rather strange that a person like the respondent who is a staff Nurse working in a hospital at Bombay does not even remember the name of the hotel in which she stayed on two occasions with her so called lover. Normally a girl will never forget the name of the hotel in which she had the first experience of her sexual relationship. Moreover, she says that there are records in her hostel to show that she had left the hostel. Then those records would have been the best evidence to show that she had gone out along with the petitioner on those two days. But she

never cared to produce those records. Moreover, she also does not state the actual dates on which they spent the time in the hotel. Vague version that it was in May (without mentioning even the week) and the second week of July cannot be accepted as correct. Therefore I am inclined to disbelieve the version of the respondent that she had stayed with the petitioner in the hotel on two occasions.

13. The learned counsel for the respondent Sri K.K. Chandran Pillai placed strong reliance on Section 112 of the Evidence Act which reads as follows :

"Section 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."

Therefore, according to him, there is a presumption in favour of the respondent that the child borne during the continuance of a valid marriage within 280 days is the legitimate child of the man. Thus the burden shifts on the man to prove that he had no access to the opposite party at any time when the child could have been begotten.

14. The learned counsel invited my attention to the ruling of the Supreme Court reported in Goutam Kundu Vs. State of West Bengal and another, . In that case the marriage took place on 16th January, 1990. In the month of April 1990 the wife conceived. She gave birth to a female child on 3rd January, 1991. When the wife moved for maintenance of her child, the husband wanted to have a blood grouping test so as to prove that he was not the father of the child. In the above context the Supreme Court observed as follows :

"21. The above is the dicta laid down by the various High Courts. In matters of this kind the court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim paterest quern nuptiae demonstrant the is the father whom the marriage indicates). 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.

22. It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

24. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual "co-habitation"."

15. The Supreme Court has also quoted an earlier judgment with approval reported in Smt. Dukhtar Jahan Vs. Mohammed Farooq, , which 1 eld as follows at page 1052 (of AIR):

".....Section 112 lays down that if a 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 and the mother remains unmarried, it shall be taken as 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. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father, Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman."

16. The learned counsel also brought to my notice the Division Bench judgment of this Court reported in Mathew v. Annamma Mathew 1993 (2) KLT 1016. In the above judgment, the Division Bench discussed the various aspects relating to the presumption arising u/s 112 of the Evidence Act and came to the following conclusion :

"12. The Indian Evidence Act, 1872 maintains the distinction between the wrods "may presume", "shall presume" and "conclusive proof" in Section 4. The words "may presume" merely enables the Court to raise or not to raise a presumption while the words "shall presume" requires the Court to necessarily raise the presumption. While in the first, the Court may or may not raise the presumption, in the second, the Court must necessarily raise the presumption. But in both situation, that is to say, where the presumption is raised in the first as well as the second types of situations, the presumption is returnable. The definition of "may presume" as well as "shall presume" in Section 4 clearly provides that the presumption holds "until it a disproved''. That is why the presumption raised in both these situations is rebuttable.

13. But the position is not so if the Legislature uses the words "conclusive proof. Section 4 defines "conclusive proof as follows :

"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."

In other words, if the Legislature uses the words ''conclusive proof'', there is no question of rebuttal because the definition in Section 4 uses the words ''conclusive proof'' and states that the Court ''shall not allow evidence to be given for the purpose of disproving it."

14. It that be the true meaning of the words ''conclusive proof used in Section 112, there is no question of adducing rebuttal evidence. If the birth of the child has taken place during the continuance of a valid marriage between the mother and any man (or within 280 days after its dissolution the mother remaining unmarried), the legitimacy of the child vis-a-vis the man is to be deemed as ''conclusively proved'' and no question of permitting rebuttal evidence to disprove legitimacy vis-a-vis the father arises. The section provides a single exception wherein rebuttal evidence can be adduced and the exception so provided is, in our view, exclusive and cannot be widened. The said sole exception is, therefore, confined to the situation :

"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.

That the words ''conclusive proof in Section 112 preclude any evidence in rebuttal except in the solitary situation provided in the very section is clear from the decision of the Supreme Court in Chilukuri Venkateswarlu Vs. Chilukuri Venkatanarayana, ."

In the above case the Division Bench rejected the version of the husband on the ground that the legitimacy of the child was conclusively established by the fact that the child was born during the continuance of the valid marriage (i.e. the marriage not yet established to be invalid).

17. On the other hand Sri.T.K. Koshy, learned counsel appearing for the petitioner vehemently submitted that Section 112 applies only if the marriage is valid, and that if there was fraud or suppression of facts by the wife regarding her pregnancy on the date of the marriage, the marriage is a nullity. Therefore, according to him, the presumption u/s 112 is not applicable to the facts of this case wherein it has to be held that the respondent was pregnant at the time of the marriage, a fact which I have already held in the previous paragraphs. In order to impress upon the court about the above argument, the learned counsel has relied on the following decisions viz., the decisions reported in Abdul Rahimankutty Vs. Aysha Beevi and Another, : and Abdulla v. Beepathu, (ILR 1967 (1) Ker 361. In Abdui Rahimankutty''s case Justice T.K. Joseph held as follows at page 102 (of AIR) :

"The presumption u/s 112 can be drawn only if the child is born during the continuance of a valid marriage or within 280 days after its dissolution. Concealment of pregnancy at the time of marriage clearly amounts: to fraud. Where consent to a contract of marriage has been obtained by force or fraud, such a marriage is invalid unless ratified after the coercion has ceased, or the duress has been; removed, or

when the consenting party, being undeceived, has continued the assent, when the fraud became known to the husband, he ceased to be a consenting party to the marriage. Hence there is no valid marriage so as to attract the presumption u/s 112 of the Evidence Act."

In Abdulla''s case ILR 1967 (1) Ker 361, Justice Issac dealt with the above question as follows :

"Under Setion 112 of the Evidence Act it shall be conclusive proof of the legitimacy of the child which was born during the continuance of a valid marriage or within 280 days after its dissolution, the mother remaining unmarried. This result can be got over only if it is shown that the marriage was invalid, or the parties to the marriage had no access to each other at any time when the child could have been begotten. If we accept the case of the wife on the question of divorce the child was born during the continuance of the marriage. If we accept the husband''s case, the child was born within 280 days of the divorce. Therefore, in any case Section 112 is attracted. Under this section when it is established or when it is found that there was a marriage, the burden will be on the person who pleads that it is not valid to show that why it was invalid. But when it is further established that at the time of marriage, the bride was pregnant, it ipso facto vitiates the marraige unless the opposite party proves that this fact was within the knowledge of the bridegroom at the time of the marriage. That means, the burden is on the wife, if she was pregnant at the time of the marriage to establish that the factum of pregnancy was known to the husband. In this case, the wife has not discharged that burden of proof. As such it has to be held that it has not been established that the respondent is the child of the petitioner."

18. Thus it can be safely inferred that Section 112 is applicable only if there is a valid marriage. If there was no valid marriage initially, there cannot be any scope for a presumption of legitimacy of the child. The presumption applies only when a child was born during the continuance of a valid marriage or within 280 days after the dissolution of the marriage and the mother remaining unmarried. If the presumption u/s 112 is stretched to other cases, anomaly may occur. Suppose a child was bom immediately within a few days of the marriage, still a presumption will apply. Then the no access has to be proved at a time before the marriage took place. The question of noh access must relate to a time after the marriage and not before the marriage. In this case the case of the respondent is that the petitioner had access to the respondent before marriage. The above fact has been held to be not proved by the respondent.

19. In this connection it is useful to refer to certain passages of a Supreme Court ruling reported in Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati, The facts of the above case were as follows : The marriage took place on 10th March, 1947. A daughter was born to the wife on August 27, 1947. The birth was after 5 months and 17 days of the marriage. Therefore the husband suspected that the

child has been conceived long prior to the marriage through some one else and that the fact of pregnancy was concealed from him. Therefore the question in the above case was whether the wife was pregnant by some one other than the husband at the time of the marriage. Thus it can be seen that the facts of the above case were almost similar to those in this case. The Supreme Court in the above case observed as follows at page 374 (of AIR) :

"The main question for determination in this case is whether the child born to the respondent on August 27, 1947 could be the child of the petitioner, who, on the finding of the Courts below which was accepted by learned counsel for the respondent before us, did not cohabit with the respondent earlier than March 10, 1947. Counting both the days, i.e. March 10 and August 27, the total period between those dates comes to 171 days. The child born to the respondent is said to have weighed 4 pounds, the delivery being said to be normal. The child survived and is said to be even now alive. It is not disputed that the usual period of gestation from the date of the first coitus is between 265 and 270 days and that delivery is expected in about 280 days from the first day of the menstruation period prior to a woman conceiving a child. We shall later be examining the point urged before us by learned counsel for the respondent, as regards the possibility of a living child being delivered after a gestation of this duration, but it is sufficient at this stage to point out that if the delivery was normal, the child born also normal and alive, it was not suggested that it was possible in the course of nature for such a child being born unless the conception took place long before March 10, 1947."

19.1 The Supreme Court also has quoted a ruling of Cairns, J. reported in W. v. W (1963) 2 All ER 386. In that case the child was born 195 days after the marriage.

"The marriage was on Oct. 7, 1961. The child was born on April 19, 1962. It is, therefore, obvious that the wife was pregnant at the time of the marriage."

The Supreme Court has also quoted with approval certain experts opinion regarding the weight of the foetus in a premature delivery :

"Taylor states at p. 32 in his "Principles and Practice of Medical Jurisprudence", 11th Edn. Vol. II :

"In the absence of any skilled care Huntler''s dictum on the unlikelihood of survival when born before the 7th calendar month remains as true as it was."

"Williams, in his book on Obstetrics, states at p. 186 that at the end of the 6th month, the foetus weighs about 600 grams and a foetus born at this period would attempt to breath, but almost always perishes within a short time. He further states that in the 7th month the foetus attains a weight of about 1,000 grams and that a foetus born at this time moves its feet quite energetically and cries with a weak voice and as a rule it cannot be reared, but occasionally expert care is rewarded by a successful outcome. Williams, however, states that generally speaking the length

affords a more accurate criterion of the age of the foetus than its weight. The weight of the child, however, is a good index of the period of gestation, though it is not as good and accurate as the length of the child born. The baby''s weight of 4 lbs. at birth is not consistent with its being born after a gestation period of 185 days." ,

Regarding the calculation of the notional period of pregnancy it was observed as follows in the above judgment :

"The notional period of pregnancy is calculated from the first day of the menstruation preceding the conception and it is on this account that 14 days are added to the period of pregnancy from the actual date of conception. On the basis of motional calculation, the fully mature child is born after 280 days. On the basis of the date of conception, the child is born between 265 and 270 days. The development of the foetus undoubtedly depends on its age as counted from the date of conception and it is for this reason that the books on Obstetrics mostly deal with the development of the foetus on the basis of days or weeks after conception, for a period of about 2 months and thereafter they begin to note its development with respect to the end of the 3rd and consecutive months. This must be due to the fact that by that time a difference of about a fortnight in the period of gestation does not bring about a substantial difference in the description of the development of the foetus."

20. The learned Judges of the Supreme Court also referred to Sections 112 and 114 of the Evidence Act as follows :

"Lastly we may refer to Sections 112 and 114 of the Evidence Act. Section 114 provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to facts of the particular case. The conclusion we have arrived at about the child born to the respondent being not the child of the appellant, fits in with the presumption to be drawn in accordance with the provisions of this section. People in general consider that the child born, being of a gestation period of 185 days, cannot be a fairly mature baby and cannot survive like a normal child."

"Section 112 of the Evidence Act provides that the fact any person was born during the continuance of a valid marriage between his mother and any man 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. The question of the legitimacy of the child born to the respondent does not directly arise in this case, though the conclusion we have reached is certain to affect the legitimacy of the respondent''s daughter. However, the fact that she was born during the continuance of the valid marriage between the parties cannot be taken to be conclusive proof of her being a legitimate daughter of the appellant, as the varipus circumstances dealt with us above, establish that she

must have begotten sometime earlier than March 10, 1947 and as it has been found by the Courts below, and the finding has not been questioned here before us, that the appellant had no access to the respondent at the relevant time."

Applying the principles and observations made by the Supreme Court in the above case, it can safely be concluded that the petitioner is not the putative father of the child born to the respondent on 25-3-1993. The respondent delivered the child after 203 days of the marriage. At that time the child weighed 3.80 Kgs. The respondent had completed by that time 38 weeks of the 40 normal weeks of pregnancy. Moreover, even according to the respondent the LMP was on 26-7-1992.

Therefore on the date of the marriage on 3-9-1992 she was pregnant. If the version of the respondent that the child was a premature baby is correct, according to the medical experts'' opinion referred to in the Supreme Court ruling, there is hardly any chance for the child to survive. Moreover, a mere look at Exts. P11(a), P11(b) and P11(c) photographs will show that the child was a full grown baby with lush black hair. It can never be concluded that the above baby shown in Ext. P11 series photographs is a premature baby. Therefore it is impossible to come to any other conclusion than that the respondent was pregnant on the date of the marriage. Therefore, there is no question of calling in aid the presumption u/s 112 of the Evidence Act.

21. There are certain letters written by the respondent to the petitioner evidenced by Exts. P7 and P8 which also belie the story of the respondent. Ext. P7 is a letter dated 25-9-1993 . This was in reply to a letter written by the petitioner which was sent by registered post. In the above letter the respondent pleads to the petitioner to forgive her for her sin. The respondent describes an incident in which the respondent was raped by a taxi driver. Ext. P8 is a letter dated 10-10-1993 in response to another letter written by the petitioner. In the above letter, the respondent again pleads guilty and asks for forgiveness. In that letter she described the affair with Koshy who sexually assaulted her wherein she had to succumb to the amorous desire of Koshy. A reading of these two letters will go to show that these incidents have been described as part of long letters written by her wherein she had described many other matters and incidents. She had repeatedly asked the petitioner to forgive for her sins. The explanation offered by the respondent in her counter affidavit as well as in the deposition is that these letters were written by her as requested by the petitioner in his letters.

One of such letters has been sent to her by registered post. The respondent could have very well produced those letters to show that the petitioner has actually requested her to write such things so as to convince his relatives that the premature delivery of the respondent is justifiable and that she must be pardoned for her aberration. The petitioner also has prayed for a direction to the respondent to produce the above letters. But the respondent has stated that she had not preserve those letters on the ground that she never thought that the petitioner would betray

her. But I am not convinced about her explanation. Even if a husband requests a wife to admit that she was sexually assaulted by others, no affectionate and faithful wife would described these things in a vivid manner as has been done by the respondent in Exts. P7 and P8 letters. Therefore I have no hesitation to discard the version put forward by the respondent to justify the contents of Exts. P7 and P8 letters.

22. The other argument put forward by the respondent is that immediately after the delivery the respondent came to Kerala for the baptism ceremony of the child, wherein the petitioner''s father, mother, father''s sister and other relatives were present. It was the petitioners father who acted as the child''s God Father. The name of the child was suggested by the petitioner. But I do not think that these circumstances would be helpful to the respondent in maintaining the unassailable fact that the respondent was pregnant at the time of the marriage and that the petitioner had no access to the respondent at any time before the marriage.

23. Therefore on a cautious consideration of the pleadings in the case, evidence adduced by the parties and the legal questions involved, I am of opinion that the respondent was pregnant at the time of the marriage and that the petitioner had no access to the respondent before the marriage.

24. The petitioner has specifically pleaded and proved that he would not have consented for the marriage had he known that the respondent was pregnant the time of the marriage. Therefore it is clear that the fact of pregnancy of the respondent at the time of the marriage was concealed from the knowledge of the petitioner. It is only a fraud played on the petitioner. Therefore he is entitled to get a declaration of nullity of his marriage with the respondent.

25. Under these circumstances the Original petition is allowed. The marriage of the petitioner with the respondent is declared as a nullity.