

(1983) 09 KL CK 0020

High Court Of Kerala

Case No: O.P. No. 3124 of 1980E

Augustine Johnson

APPELLANT

Vs

Elizabeth

RESPONDENT

Date of Decision: Sept. 12, 1983**Acts Referred:**

- Divorce Act, 1869 - Section 14, 16, 17, 18, 19

Hon'ble Judges: T. Chandrasekhara Menon, J**Bench:** Single Bench**Advocate:** S.A. Nagendran, N.N.D. Pillai and K.B. Subhagamoni, for the Appellant; P. Kesavan Nair and N. Balakrishna Pillai, for the Respondent**Final Decision:** Dismissed

Judgement

Chandrasekhara Menon, J.

This is a petition filed by the husband under Sections 18 and 19 of the Indian Divorce Act, 1869 (Act IV of 1869), (the Act in short), for a declaration of nullity of marriage under Sections 18 and 19 of the Divorce Act. The petitioner and the respondent are Indian Christians. They were married on 27th January 1980 by a ceremony of marriage conducted according to the rites of the Catholic Church, at the St. Joseph's Church, Cochin-6. From 27th January 1980 up to 27th March 1980 the petitioner lived with the respondent at Chakalaparambil House, Cochin.

2. According to the petitioner, immediately after the marriage ceremony, someone or other of the relatives of the respondent used to come to the house of the petitioner and wanted to take the respondent to her father's house under the pretext of treating her for some alleged stomach trouble. From this and her physical appearance the petitioner became very suspicious that the respondent was pregnant at the time of marriage from a person other than the petitioner. Therefore she was subjected to medical examination on 26th March 1980 at Gautham Hospital, Cochin-5 by an eminent physician, Dr. K.R. Jayachandran, a member of the

Royal College of Physicians of Edinburgh and Glasgo. On 26th March 1980, as per the Doctor's opinion, the respondent was having 30 week's pregnancy. Therefore, according to the petitioner, the respondent became pregnant at least five months before the marriage. On 27th March 1980 the petitioner entrusted the respondent to her father Sri George in the presence of Shri C.V. Rajan, Councilor of Cochin Corporation and some other persons. The respondent was admitted in the General Hospital, Ernakulam for delivery and she delivered a full term male baby on 20th May 1980. Dr. Molykutty Thomas had attended the delivery and she had issued a certificate regarding the same.

3. The petitioner would submit that the respondent has given birth to a normal child, 115 days after the marriage and since the petitioner has sexual intercourse with the respondent only after the marriage took place the child could not have been his. He would, therefore, contend that since the respondent was pregnant at the time of marriage, and it was fraudulently concealed from him, the consent of the petitioner for the marriage was obtained by fraud. If the petitioner had known this fact of the respondent's pregnancy, he would not have agreed for the marriage. Therefore, he prays that his marriage with the respondent be declared null and void. He expressed his willingness to pay back Rs. 2,000 received by him at the time of marriage from the respondent's father and also some of the gold ornaments belonging to the respondent which are now with him.

Respondent's plea in the matter.

4. About one year before the date of marriage, the petitioner's sister Smt. Stella Balachandran, a neighbour of the respondent, had put forward a proposal for marriage of the petitioner with the respondent. The petitioner wanted the bride to have gold ornaments of twelve sovereigns and a sum of Rs. 10,000 in cash. The respondent's parents accepted the terms, but they wanted one year's time to arrange the cash and the ornaments. The petitioner agreed to this. However, from the month of May 1979 onwards the petitioner used to make frequent visits to the respondent's house. He succeeded in winning the confidence of the entire members of the house by his manners and behaviour. Deep intimacy developed between the petitioner and the respondent. The petitioner occasionally used to reside in the respondent's house and the parties, the petitioner and the respondent, began to have sexual relationship before the marriage. The respondent became pregnant by September 1979.

5. The respondent's father was able to get Rs. 2,300 only by January 1980 and also gold ornaments of 10♦ sovereigns. As the Respondent's pregnancy was advancing, the marriage had to be conducted posthaste. According to the Respondent, by the beginning of March 1980, the Petitioner began to make demands for the balance amount due to him as per the marriage agreement. In March she was having abdominal pain and she was taken to Gautham Hospital. On the same day the Petitioner took the Respondent to her house (it being customary, according to her,

to entrust the pregnant wife to the care of her parents). At her house he created a scene by demanding her father that he should be given the balance amount promised to him. There was some altercation between the Petitioner supported by his friends, and the Respondent's people and there was some mediation there.

6. The Respondent would assert that the Petitioner himself was responsible for her pregnancy and there was neither necessity nor occasion to make any concealment of her pregnancy. The Petitioner has taken from her all her gold ornaments before he took her to her house. She would state that after her delivery, the Petitioner did come to her house in the month of June 1980 and told her father and brother that he would not take her back unless he is paid the full amount promised by her father. According to the Respondent, the Petitioner did not have any allegation then against the Petitioner as he now makes in the Original Petition.

Petitioner's reply:

7. In the reply affidavit filed by the Petitioner to the allegations of the Respondent in the counter-affidavit, he has controverted her statements which goes against his contention in the petition. According to him, he had visited the Respondent's house only twice before the marriage. The first time he went to the house of the Respondent to see her along with his mother and sister was in November 1979. A second time he had gone to her residence before the marriage on 30th December, to attend to the betrothal (manasammatham). He strongly refutes any intimacy with her prior to the date of marriage.

8. How and why the Respondent was taken back to her house and entrusted to her father is further explained by him. It was in the presence of Shri T.V. Rajan, Councillor of Cochin Corporation and other witnesses at the office of the Councillor. At that time the parties, the Respondent's father, Sri V.R. Simon, Sri C.V. Rajan and some others had affixed their signature to a statement which has been produced in the case.

Issues:

9. On the basis of the pleadings, I raised the following issues for decision in the matter:

1. Whether the consent of the Petitioner for marriage has been obtained?
2. What is the order as to costs?

I think the first issue ought to have been framed as "whether the consent of the Petitioner for marriage has been obtained fraudulently as alleged by the Petitioner". An issue as to what reliefs the parties are entitled has also to be considered. In the nature of the evidence given, no party would be prejudiced if these issues really arising in the case are considered as if they have been duly framed. Therefore, I will deal with them accordingly.

Findings:

10. 13 witnesses have been examined on the Petitioner's side and on the Respondent's side 4 witnesses have been examined. Exts. P-1 to P-21 are marked for the Petitioner while for the Respondent, Exts. B-1 to B-4 and B-5 series have been marked. P.W. 1 is the Parish Priest and custodian of the marriage register. P.W. 2 is the Parish Priest who actually officiated at the marriage ceremony. P.W. 3 is the doctor who examined the Respondent and issued Ext. P-10 certificate which indicated that at the time of her examination by P.W. 3 the Respondent was having all the external signs of 30 weeks pregnancy. He has said that the Respondent was of slight built and persons of slight built show signs of pregnancy comparatively at early stages. As a general rule it is not possible for persons of slight built to conceal the pregnancy after 5 to 6 months. It cannot be said affirmatively in all cases. He also said that before he issued Ext. P-10 was not told by the patient as well as the persons who accompanied her that she was pregnant. P.W. 4 is the Assistant Surgeon who attended the delivery of the Respondent. The Respondent delivered a male child on 20th May 1980. She also states that till the Respondent was removed from the maternity ward to the surgical ward on 2nd June 1980 the child was quite healthy. P.W. 5 is a Marxist party worker who is a signatory to Ext. P-15 statement signed by the Petitioner, Respondents and the Respondent's father. He has stated: He states in cross-examination that:

P.W. 6 is Rajan, the Corporation Councillor. He says that Ext. P-15 was signed before him. In cross-examination he has stated:

Before this, he has stated in the cross-examination itself:

He has stated that the matter stated in Ext. P-15 was as recited by the Petitioner's people. He also states that he was present at the time when the parties returned from the church after the marriage. A photo was taken at that time and he saw the Respondent well at that time. To a question in the cross-examination.

He has replied that it appeared to him to be so.

P.W. 7 is an aunt of the Respondent. She has been examined to prove Ext. P-16 letter sent by her in Ext. P-17 postal cover. It is true that the contents of Ext. P-16 to some extent supports the Petitioner's case. But P.W. 7 has also stated that at the time of marriage the Respondent appeared to be pregnant. P.W. 8 is one Vasudevan who is speaking generally in support of the Petitioner's case. He belongs to Panthalam and his house is very near to the mother's house of the Respondent. They were neighbours. When he came to Cochin on a transfer of his job to the Fisheries Corporation (he is a driver in the Fisheries Corporation), he was residing in the Respondent's house. He is said to have taken the initiative in fixing the marriage between the Petitioner and the Respondent. The fixation of the marriage was in 1979 November, and nobody was aware at that time that the Respondent was

pregnant. He has been cross-examined in detail by the Respondent. He has been asked whether he was not telling the truth to help the Petitioner, which he has denied. It has come out from his evidence that the Respondent belonged to the Jacobite Community at the time of marriage with the Petitioner who was a Catholic. He says that he actively participated in the negotiation for the marriage and that he had no knowledge whether the Respondent had come over to the Catholic community. He says that the marriage was conducted in the Catholic Church. P.W. 9 is the sister of the Petitioner, Stella, who supports the Petitioner's case. P.W. 10 is said to be a neighbor of the Respondent. She has stated that the Petitioner has come to the Respondent's house for the first time only 2 months before the marriage. She says that she knew about the pregnancy of Elizabeth only 2 months after the marriage. P.W. 11 is one Ramachandran who is also employed in the Fisheries Corporation. He says that in 1978 when he got employment in Cochin he was residing in the Respondent's house. Vasudevan, this witness's brother was also residing there. P.W. 11 says that before the engagement the Petitioner has not come to the Respondent's house. P.W. 12 is the Petitioner and P.W. 13 is one Varghese. He was living near Respondent's father's house in Palluruthy for some time. He has been examined mainly to bring out certain contradictions in the evidence of R.W. 4, Sivan Pillai, who has been examined on the Respondent's side.

11. R.W. 1 is the Respondent who speaks her case. R.W. 2 is the photographer who took the marriage photos Exts. B-1 to B-4. R.W. 3 is one Sadanandan who speaks as to what happened at the time when Ext. P-10 statement was prepared. R.W. 4 is Sivan Pillai referred to earlier. He has been examined to prove that the Petitioner frequented the house of the Respondent even six months earlier to the marriage.

12. The main question that arises for consideration is whether the Petitioner had really consented to the marriage or whether the consent was obtained fraudulently. The view that was prevalent at one time was that in regard to the scanning of proof in cases under the Divorce Act. The Judge should be satisfied beyond reasonable doubt as to the commission of matrimonial offence. Then only it could be said that the Judge was satisfied within the meaning of Section 14 of the Indian Divorce Act. Section 14 states:

14. Power to Court to pronounce decree for dissolving marriage.--In case the Court is satisfied on the evidence that the case of the Petitioner has been proved,

and does not find that the Petitioner has been in any manner accessory to or conniving at the going through of the said form of marriage, or the adultery of the other party to marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the Respondents, the Court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in Sections 16 and 17 made and declared:

Provided that the court shall not be bound to pronounce such decree if it finds that the Petitioner has during the marriage, been guilty of adultery;

or if the Petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecution such petition,

or of cruelty towards the other party to the marriage,

or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse,

or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery.

Under Section 4 of the English Act, Matrimonial Causes Act of 1937 the same words "satisfied on the evidence" occur. There, it has been held in the earlier cases that the evidence must be clear and satisfactory beyond the mere balance of probabilities and conclusive in the sense that it will satisfy what Sri Willam Scott described in *Loveden v. Loveden* (1910) 161 E.R. 648 as "the guarded discretion of a feasonable and just man". What exactly it means was explained in *Prestom Jones v. Prestom Jones* 1951 A.C.C. 391. There Lord MacDermott speaking for the House of Lords said:

The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be "satisfied" in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusion as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt v. Moncreiffs* (1874) L.R.SC.374 that the two jurisdictions are other than distinct. The true reason, as it seems to me why both accept the same general standard-proof beyond reasonable doubt-lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned.

This principle was applied by the Supreme Court in a the under the Indian Divorce Act, in view of Section 7 of the Act It was said in [Earnest John White Vs. Mrs. Kathleen Olive White and Others](#), that:

...in all suits and proceedings under the Act shall act and Rive relief on principles and rules which in the opinion of the Court are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. In our opinion the rule laid down by the House of Lords, would provide the principle and rule which Indian Courts should apply to cases governed by the Act and the standard of proof in divorce cases would therefore be such that if the Judge is satisfied beyond reasonable doubt as the commission of the matrimonial offence he would be satisfied within the meaning of

Section 23 of the Act. The two jurisdictions i.e., matrimonial and criminal are distinct jurisdictions but terms of Section 14 make it plain that when the Court is to be satisfied on the evidence in respect of matrimonial offences the guilt must be proved beyond reasonable doubt and it is on that principle that the Courts in India would act and the reason for adopting this standard of proof is the grave consequence which follows a finding of guilt in matrimonial causes.

13. However, the House of Lords itself not long after took, a different view in the decision reported in *Blyth v. Blyth* 1966 All. E.R. 524. The majority view there (2 of the Law Lords, Lord Morris and Lord Morton differed from the majority view) was that the words "is satisfied" was not in all cases beyond reasonable doubt but might vary according to the gravity of the subject-matter. Lord Denning referred to the view of Justice Dixon, as he then was, in *Wright v. Wright* (1948) 77 C.L.R. 191 a decision of the High Court of Australia, where it was said:

Whilst our decision is that the civil and not the criminal standard of persuasion, applies to matrimonial causes, including issues of adultery, the difference in the effect is not as great as is sometimes represented. This is because, as is pointed out in the judgments in *Briginshaw v. Briginshaw* (1938) 60 G.L.R. 336, the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue and because the presumption of innocence is to be taken into account.

Lord Denning and the majority view more or less followed Lord Dixon in *Wright v. Wright* (1948) 77 C.L.R. 191. The learned Lord Justice observed:

...In short it comes to this: So far as the grounds for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear. So far as the bars to divorce are concerned, like connivance or condonation, the Petitioner need only show that on balance of probability he did not connive or condone or as the case may be.

This view of the house of Lords was accepted by the Supreme Court in a case under the Hindu Marriage Act. Justice Chandrachud, as he then was, said in [Dr. N.G. Dastane Vs. Mrs. S. Dastane](#),

28. In England, a view was at one time taken that the Petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in (1966) 1 All. E.R. 524 at P. 536 the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case, like any civil case, may be proved by a preponderance of probability". The High Court of Australia in (1948) 77 C.L.R. 191 at P. 210 *Wright v. Wright*, has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore in error in holding that the Petitioner must establish the charge of cruelty "beyond

reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation.

Even apart from the Supreme Court's decision, this Court is bound to follow the House of Lords' decision in view of Section 7 of the Act, which states to "act and give relief on principles and rules conformable to the principles and rules on which the court for divorce and Matrimonial causes in England for the time being acts and gives relief". No doubt the expression "principles and rules" does not mean that the grounds on which the suit for proceedings may be instituted but only relates to the norms by which the court will exercise its jurisdiction for the purpose of disposing of the suit or proceedings pending before it. Even going by the House of Lords' decision, as Lord Denning said in *Blyth v. Blyth* 1966 All E.R. 524, though a plea may be proved by preponderance of probabilities, the degree of probability depends on the subject-matter and in proportion as the offence is grave, so ought the proof to be clear. There cannot be any doubt that what the Petitioner has accused the Respondent and her people is something extremely grave. What is alleged is that the Respondent was pregnant at the time when the marriage was conducted, the Petitioner was unaware of the pregnancy, and the Petitioner was fraudulently induced to consent to the marriage he being unaware of the pregnancy. The Respondent admits that she was pregnant. But what she states is that she was pregnant by the Petitioner. In the light of the evidence it cannot be said that the Petitioner has established his case by clear evidence. According to me, the Petitioner has failed to establish that he was fraudulently induced to enter in the marriage. Even according to him the marriage was at a time when the Respondent was 5 months pregnant. I am not certainly depending on the appearance of the Respondent in the photograph produced by the Respondent to prove that it was apparent from her appearance there that she was pregnant. It may not be easy to come to such a conclusion from the mere appearance in the photo. But we have to take into account the fact that even the doctor has positively said that in respect of persons of slight built like the Respondent, it will not be easy to conceal the pregnancy of five months. No doubt, there may be exceptions to this. There is also the evidence given by one of the Petitioner's witnesses, P.W.5 that he was present at the time when the married couple had returned to the Respondent's house from the church and to him it was apparent that the Respondent was pregnant. This answer elicited in the cross-examination of the witness has not been sought to be explained away in any reexamination. On an assessment of all evidence in the case it may not be possible to come to a definite conclusion that the Petitioner was ignorant of the fact that the Respondent was pregnant at the time of marriage and he was induced in the marriage by the fraudulent act of the Respondent and her people. The case of the Respondent that the Petitioner was responsible for her pregnancy even before the marriage seems to be more probable in the circumstances of this case.

14. It is a very unfortunate case where both parties do not want the broken marriage to continue. But then it is difficult for this Court to give satisfactory solution in the matter in view of the relevant statutory provisions. Finding in favour of the Petitioner in this case would be destroying the life of the Respondent. No doubt, if there are very positive proof in the matter, the court has no option but to hold in favour of the Petitioner. I think it is time that there should be statutory provision for dissolution of marriage on consent of parties in cases where continuation of the marriage status would result in unhappiness to both the parties. It is for the representatives of people and the legislature to consider this aspect and make appropriate amendments in the Indian Divorce Act. With this observation, I dismiss the Original Petition, in the circumstances, without costs.