

(1961) 12 KL CK 0021

High Court Of Kerala

Case No: Criminal R.P. No. 236 of 1961

Narayana Menon

APPELLANT

Vs

Bharathi Amma and Another

RESPONDENT

Date of Decision: Dec. 1, 1961

Acts Referred:

- Evidence Act, 1872 - Section 112

Citation: (1962) KLJ 28

Hon'ble Judges: Anna Chandy, J

Bench: Single Bench

Advocate: T.V. Prabhakaran, for the Appellant; P.S. Usuph, A. Rajappan and P.K.M. Hassan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Anna Chandy, J.

This is an interesting case in which a police man stoutly swears that he married a woman nine months pregnant without being aware of her condition and where a child which, according to its mother, was born to a person other than her husband and the paternity of which is denied by the said person is claimed by the husband to be his own. The Petitioner Bharathi Amma moved the District Magistrate, Ernakulam, u/s 488 Criminal Procedure Code for grant of maintenance for her infant daughter Geetha from the counter-petitioner Narayana Menon a Police Constable. Her case is that after separation from her prior husband one Narayana Pillai by whom she had had two children, she and the counter-petitioner were living as man and wife during which time she conceived Geetha. A marriage ceremony was conducted between the counter-petitioner and herself on 25-3-1958 and a month later on 26-4-1958 she gave birth to Geetha. A few months later the counter-petitioner moved for the dissolution of his marriage with her and since then

he has refused to contribute to the maintenance of the child. The counter-petitioner denied the paternity of the child. According to him at the time of his marriage to the petitioner he was unaware that she was pregnant. He also denied having had any physical relationship with the petitioner either before or after the marriage.

2. Aggrieved by the order granting maintenance passed by the learned Magistrate who found that in spite of the legally subsisting marriage with Narayana Pillai at the time the child was conceived and also in spite of Narayana Pillai's claim (he was examined as a witness for the counter-petitioner) that the child is his, it is the counter-petitioner who begot Geetha, he has now approached this Court in revision.

3. It is strongly urged by the Learned Counsel for the revision petitioner that in view of the subsistence of the prior marriage leading to the presumption u/s 112 of the Evidence Act a presumption reinforced by Narayana Pillai's claim to the paternity of the child, the burden lies heavy on the petitioner to prove that the child was not born to her husband and that burden has not been discharged.

4. According to Section 112 of the Evidence Act birth during continuance of a valid marriage is "conclusive proof" of legitimacy unless, as the latter part of the Section itself provides, it is proved that the husband and wife had no access to each other at any time when the child could have been begotten. Thus the presumption of legitimacy though strong is rebuttable. No doubt the evidence must be strong and unequivocal. To put it in the words of Justice Panchapakesa Ayyar.

"It is not quite impossible for children born to a married woman to be legally held to be the progeny of a paramour. The presumption under S. 112, Evidence Act, though no doubt a strong one, is not conclusive and can be rebutted, by proving that, at the time when the children or any of them could have been conceived, the husband could not have had access to his wife,....." (Vide Sreenivasan v. Kirubai (A.I.R. 1957 Mad 160)).

In this case besides the positive evidence of the petitioner and her brother and sister who were living with her that after Narayana Pillai abandoned her as early as 1954 he did not visit her and that the revision petitioner and she were living in her house as man and wife, there is the inadvertent, but significant admission made by Narayana Pillai who came forward to shoulder the paternity of the child that after he left for Madras in 1952 he returned to the place only in October 1960. He further admits that he does not even know the name of the second child which is aged 7 or 8 or the place where it was born. The evidence of Narayana Pillai, who is found to be a man of no scruples has been given its proper place in the scheme of things by the learned District Magistrate. This anxiety to shoulder the responsibility for a child begotten by another is definitely born of some obligation to the respondent policeman. Even more ridiculous is the theory advanced by the respondent in this case. It is a challenge to the intelligence of any court to say that a mature man and that a police man, marrying a woman with a belly nine months big would have been

unaware that she was pregnant.

The Revision Petition is frivolous and has to be dismissed. The order directing the revision petitioner to pay the maintenance at the rate of Rs. 7/- per mensem to the child is just and proper and my only regret is that there is no scope for enhancing the amount. The petition is therefore dismissed.