(1980) 10 MP CK 0011

Madhya Pradesh High Court (Gwalior Bench)

Case No: F. A. No. 25 of 1979

Ghanshyam Chaturvedi		APPELLANT
	Vs	
Radhadevi		RESPONDENT

Date of Decision: Oct. 27, 1980

Acts Referred:

- Hindu Marriage Act, 1955 - Section 28

Citation: (1982) MPLJ 487

Hon'ble Judges: A. R. Navkar, J

Bench: Single Bench

Advocate: R. A. Roman, for the Appellant; Arun Mislura, for the Respondent

Final Decision: Allowed

Judgement

A. R. Navkar, J.

This is an appeal u/s 28 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act), against the Judgment and decree dated 27-4-1979, passed by the District Judge, Vidisha, in Civil Suit No. 3-A /76, whereby the suit of the appellant u/s 12(d) of the Act has been dismissed.

The facts giving rise to this appeal are as under. Ghanshyam Cbaturvedi is the plaintiff and Radhadevi alias Panbai daughter of Bhaiyalal is the defendant. The plaint allegations are that on 27-2-1975, the plaintiff and the defendant were married and on 1-3-1975, the plaintiff and the defendant came to Vidisha. On 2-3-1975, they celebrated their honey-moon and it is alleged in the plaint that on 2-3-1975, the plaintiff had intercourse with the defendant-his wife. The defendant stayed with him for eight days and went back to her parents. On 30-4-1975, the plaintiff brought her back to Vidisha, but after staying for fifteen days, the defendant went to her parents with her brother. She took along with her the ornaments which were given to her in marriage. On 25-8-1975 when the plaintiff went to his wife to bring her back, she did not come before him and on the same

day, she gave birth to a well-developed child. From 2-3-1975 to 25-8-1975, there is an interval of 175 days only. Therefore, the plaintiff was surprised to hear that his wife has given birth to a well-developed child and he enquired about this matter with the parents of the defendant, but they had no reply. As the plaintiff did not get any reply, he went back to Vidisha on 26-8-1975, leaving the defendant with her parents. On 25 8-1975, when the plaintiff-husband came to know that his wife was pregnant by somebody else, he never had any sexual relations with his wife after 25-8-1975. That is to say, the plaintiff and defendant never continued their relationship of husband and wife after 25-8-1975 so as to condone the lapse on the part of the defendant. Further, it is alleged in para 8 that the defendant was pregnant at the time of marriage and the conception was by somebody else as the plaintiff and the defendant consummated the marriage for the first time on 2-3-1975 and they had no sexual relationship before that date. The plaintiff was unaware of this fact and for the first time he came to know on 25-8-1975 that the defendant is pregnant by somebody else. In para 9 of the plaint, it is further submitted that as the defendant wife was pregnant at the time of marriage and as husband was unaware of this fact, he has filed this petition for declaration that the marriage is a nullity because of the facts mentioned above. The other allegations in the plaint are not material for decision of this case.

Defendant-wife has filed the written statement, accepting that on 27-2-1975, she was married to the plaintiff, but the allegation of the plaintiff that for the first time intercourse took place on 2-3-1975 was denied and she has submitted that the intercourse for the first time took place on 7-2-1975 when the plaintiff came to see the defendant. It is further submitted that on 7-2-1975 when the plaintiff came to the house of the defendant, he expressed the desire that he should have a talk with the defendant in privacy and if he is satisfied, then alone, he will give his approval. The plaintiff, in the night on 7-2-1975, met the defendant and expressed his desire that they should have an intercourse. The defendant showed her disapproval to this, saying that as long as they are not married, the suggestion of the plaintiff cannot be accepted. The plaintiff said to her that now they have promised each other to become husband and wife and the marriage will take place according to the Hindu rites, but from that day, they have become husband and wife. Therefore, believing the words of the plaintiff, she submitted to the desire of the plaintiff and the conception took place. She has denied the suggestion that she was pregnant at the time of the marriage. But, she has accepted that she has given birth to a child on 25-8-1975. She has further alleged that as the child was weak, delivery took place after six months and eleven days of the marriage. The plaintiff has filed the application to suppress the fact which is not approved by the society that he had intercourse with the defendant before marriage. But, in fact, the father of the child was the plaintiff himself and the child was born after seven months and nine days after she had intercourse with the plaintiff. As to the return of ornaments given to her at the time of marriage, the defendant has said, they were already with the

plaintiff. On the basis of these allegations and denials, the trial Court framed the following issues :-

Whether the plaintiff went to see the defendant on 7-2-1975 for the first time? ... Yes.

Whether the plaintiff met the defendant the same night and had an intercourse with her in spite of her protest? ... Not proved.

Whether the plaintiff had an intercourse with the defendant on 2-3-1975 for the first time? ... Yes.

Whether the defendant was pregnant at the time of marriage and if so, what is its effect on the Suit? ... Not proved.

Whether the defendant gave birth to a child within 175 days of her intercourse with the plaintiff for the first time? ... Yes.

Relief and costs? ... Application dismissed with costs.

The learned counsel appearing for the defendant submitted before me that the plaintiff has not pleaded all the ingredients required u/s 12(d) of the Act and as he has not pleaded the requisite facts, the defendant could not reply properly. The effect of this is that there were no proper issues and the defendant was prejudiced in leading her defence. Next, it was submitted before me that I should not see the moral side, but I must decide the case on the basis of legal presumption and facts which are before me. I will take these two points one by one. As to the first point, the plaintiff has pleaded the fact of marriage. He has also pleaded the date of delivery of the child and he has pleaded that when he came to know of the lapse on the part of the defendant, he has not continued the marital relations with the defendant. The objection of the learned counsel is that the plaintiff has not said in his plaint as to when he came to know of the pregnancy of the defendant. That too is not correct. The plaintiff has pleaded all the facts required to get a decree u/s 12(d) of the Act. As to the issues, he has submitted before me that the Court should have framed an issue regarding continuation of marital relations between the plaintiff and the defendant after the plaintiff came to know of the fact that his wife is pregnant by somebody else. But, when the parties have gone to trial with all the facts before them, I think, the submission made by the learned counsel has no force. When the parties go to a trial with facts and disputed points known to them, the Supreme Court has held in Nagubai Ammal and Others Vs. B. Shama Rao and Others, that non-framing of proper issues and want of pleadings will not be aground for vitiating the trial. Therefore, I see no reason to remand the case to the trial Court and ask the parties to amend their pleadings and ask the trial Court also to reframe the issues. Therefore, I see no force in the submission made by the learned counsel for the defendant.

As to the second point, I may make myself clear that I am not deciding the case taking into consideration only the moral side of the case. But, I may make it clear that the laws are meant for keeping intact the moral and social relations between the members of the society. One cannot shut his eyes while deciding the case to the moral aspect of the case. Even section 112 of the Evidence Act is framed taking into consideration the moral side of the society, that is to say, if the presumption is not raised in favour of legitimacy, it will give encouragement to illegal relations and a number of bastard issues will increase. In England, until 1949, there was a rule that neither the testimony, nor the declarations out of Court, of the parents were admissible to prove their access or non-access during marriage, with the object, or possible result of bastardising a child born during wedlock, for which presumption u/s 112 of the Indian Evidence Act was available. But, now looking to the moral side, section 112 of the Evidence Act allows evidence by the husband and wife to be given to show that the husband had access to the wife if a presumption has to be drawn in favour of the legitimacy of the child. These two aspects of the Section clearly indicate that while drafting the provisions regarding legitimacy, the law has taken into consideration the moral aspect of the society. Therefore, I am of the view that in deciding a case, the Judge should not lose sight of the moral side of the case which affects the society. Therefore, the submission made by the learned counsel cannot be accepted.

The trial Court, after taking into consideration the evidence of the parties, disbelieved the story put forward by the defendant that she had intercourse with her husband on the very day when the plaintiff came to see her. But, the trial Court has accepted that the living child can be born within 175 days and relying on section 112 of the Indian Evidence Act, which runs as under:

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 parties to the marriage had no access to each other at any time when he could have been begotten." it held that the plaintiff is the father of the child delivered by the defendant and, therefore, there is no ground proved by the plaintiff that at the time of marriage, the defendant was pregnant by somebody else. Holding this, the learned trial Court has dismissed the application of the plaintiff. The present appeal is directed against it.

Before proceeding with the submissions made by the learned counsel for the appellant, certain facts are admitted by the parties and they are as follows: That on 7-2-1975, the plaintiff went to see the defendant whether he should approve of the girl or not. Second admitted fact is that on 2-3-1975, the plaintiff and the defendant consummated the marriage. The third admitted fact is that the defendant gave birth to a child after 175 days after the first intercourse with the plaintiff. After the plaintiff came to know of the birth of the child, the parties did not have any sexual

relationship so as to condone the alleged misdeed by the defendant. As to the admissions of parties, it is the best evidence to decide the matter. How far the admissions of the parties can be relied upon was considered in Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati, . The relevant portion from that judgment runs as under :-

In a petition for annulment of marriage on the ground mentioned in section 12(1)(d), the petitioner has in order to succeed, to prove beyond reasonable doubt that the respondent was pregnant by someone else at the time of marriage. It is, however, not correct in law in holding that the Court, in these proceedings, could in no circumstances base its decision on an admission of the parties. What the Court has to see in these proceedings is whether the petitioner has proved beyond reasonable doubt that the respondent was pregnant by someone else at the time of the marriage. The petitioner has to establish such facts and circumstances which would lead the Court either to believe that the respondent was pregnant at the time of marriage by someone else or to hold that a prudent man would, on those facts and circumstances, be completely satisfied that it was so. Earnest John White Vs. Mrs. Kathleen Olive White and Others, , Relied on; (1951) A C 391 (417).

The rule that in divorce cases under the Divorce Act of 1869, the Court usually does not decide merely on the basis of the admissions in pleadings of the parties, is a rule of prudence and not a requirement of law. That is because parties might make collusive statements admitting allegations against each other in order to gain the common object that both desire, for personal reasons. A decision on such admission would be against public policy and is bound to affect not only the parties to the proceedings but also their issues, if any, and the general interest of the society. Where, however, there is no room for supposing that parties are colluding, there is no reason why admissions of parties should not be treated as evidence just as they are treated in other civil proceedings. The provisions of the Evidence Act and the Code of the Civil Procedure provide for Court''s accepting the admissions made by parties and requiring no further proof in support of the facts admitted. (Vide section 58 Evidence Act and Order 8, Rule 5, Civil Procedure Code).

The provisions of section 58, Evidence Act and Order 8, Rule 5, CPC however, vest discretion in the Court to require any fact so admitted to be proved otherwise than by such admission. There is therefore no good reason for the view that the Court cannot act upon the admissions of the parties in proceedings under the Hindu Marriage Act.

Section 23 of the Act requires the Court to be satisfied on certain matters before it is to pass a decree. The satisfaction of the Court is to be on the matter on record as it is on that matter that it has to conclude whether a certain fact has been proved or not. The satisfaction can be based on the admission of the parties. It can be based on the evidence, oral or documentary, led in the case. The evidence may be direct or circumstantial. I L R 38 Cal. 907 and John Over Vs. Muriel Alleen Isidore Over, ."

Therefore, relying on this judgment, I find that admissions of the defendant can be relied upon and I find no collusion between the parties to get a divorce by making false admissions. Therefore, the first point to be seen is whether I can act on the admissions of the defendant-wife. The defendant in her written statement, has stated in para 6 as under : (translated into English)

The facts mentioned in para 6 of the plaint are not admitted. The defendant had intercourse with the plaintiff on 7-2-1975 and gave birth to a child on 9-9-1975. The child was very much weak and, therefore, to say that the child was delivered within 175 days after the first intercouse is not accepted. It is also denied that the child, when born was of nine months and a healthy one. It is also denied that the parents of the defendant did not reply the question put to them by the plaintiff regarding the conception of the child by the defendant.

The trial Court has found that the child was delivered just after 175 days after the first intercourse by the plaintiff and the defendant. If these facts are taken into consideration, I have to see whether the presumption u/s 112 of the Evidence Act can be availed of by the wife, that is to say, the defendant. So also, the nature of onus on the husband to prove that the child was not his. I may refer here to Nishit Kumar Biswas Vs. Sm. Anjali Biswas, . The relevant observations from this judgment read as under :-

Where it is found that the wife has delivered a mature child in 167 days from the marriage and thus the notional period of pregnancy of about 280 days from the date of first fruitful coition after marriage is absent, having regard to the ordinary course of the nature and to the interval between the marriage and the birth of the child, it is for the wife to raise a reasonable doubt that she is pregnant by the person who became her husband. The burden of proving the negative cohabitation by the husband in such cases is too high. Such a burden on the husband should be provisional and not a compelling one. If, however, circumstances appear in a given case which lead to a reasonable doubt, they would then counterbalance the provisional presumption and leave the wife with the burden of proving that the husband is the father of the child. The problem should not be approached in the general way. But it has to be approached broadly, so that even if it is held that the burden of proof is entirely on the husband, it should be so held that such a standard of proof is a light one and it should be taken to be discharged where there is admission of the parties and should be taken to be greatly shaken, when the period of gestation differs radically and diverges largely from the normal-the period of course, being a matter in which strict proof has to be required." vTherefore, applying the principles mentioned above in the above rulings, I am of the view that the husband has discharged the burden which was on him. Now, it is for the wife to show that the child was born to her by the plaintiff, by evidence. She cannot avail of the presumption of Section 112 of Evidence Act. The learned trial Court has found that the defendant gave birth to the child just after 175 days after the first

intercourse by the parties.

It is submitted before me that as the child was bom to the parties after the marriage took place, no evidence can be led to show that the child was not the child of the father because the presumption u/s 112 of the Evidence Act is a conclusive one. But, reading Section 112 of the Evidence Act, it is also for the wife to show that the husband had an access to her even before their marriage and if the husband had such an access, then the wife can rely on the presumption and say that the husband is the father of the child born to her. But, in my opinion, this fact is also not proved by the defendant wife. The Court has found that the story put forward by the defendant that the plaintiff had an intercourse with her when he first visited the defendant to give his approval is false. The story put forward by the defendant is discussed by the learned trial Court while deciding issue No. 1. I need not repeat the reasons given by the learned trial Court, to hold that the story put forward by the wife is false. I completely agree with the reasoning and the finding of the trial Court that the story put forward by the defendant that the plaintiff came to see her on 7-2-1975 and on the very day, they had the first intercourse is false. The question then arises as to which date should be held to be date of the first intercourse. For that, issue No. 3 is clear and the finding given by the trial Court that the husband and wife had their first intercourse on 2-3-1975, I think is correct. Therefore, counting the days, elapsed between 2-3-1975 and the date of delivery, I have to decide whether it can be held that plaintiff was the father of the child born to the defendant. I may refer to Mahendra''s case again (Supra) in which the effect of Sections 112 and 114 of the Evidence Act and also Section 12(1)(d) and 12(2)(b)(i) of the Hindu Marriage Act was considered. It says as" under :
In a petition for annulment of marriage u/s 12(1)(d), it must be established as required by Section 12(2)(b)(i) that the petitioner was at the time of the marriage ignorant of the fact that at the time of the marriage the respondent was pregnant by some person other than the petitioner. Where the trial Court had failed to frame an issue on the point and therefore the parties had not produced the evidence on it, the High Court would be right in remitting the issue for a finding on the question.

It was further submitted before me that in this case that the character of the wife is not challenged by the husband. This aspect was also considered in the above ruling [Mahendra''s case (Supra)} and the Supreme Court has stated as under :-

It is true that no allegation of any kind has been made about the respondent''s general immorality or about her misconducting with someone at the time when the child born to her could be conceived. The mere fact that her character in general is not challenged does not suffice to rebut the conclusion arrived at from the various circumstances already discussed. The only question before us is whether on the evidence led it is possible for the petitioner to be the father of child. The facts and matters we have set out earlier clearly establish that the conception-to produce a child of the type delivered-must have taken place before March 10, 1947, and if, as is

now the case, the petitioner''s first sexual contact with the respondent was on March 10, 1947, it follows that the respondent was pregnant by someone other than the petitioner at the time of her marriage." While considering Section 112 of the Evidence Act, it is further laid down in the above Judgment as under :

Section 112 of the Evidence Act provides that the fact that any person was born during the continuance of a valid marrige 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 various circumstances dealt with by us above, establish that she must have been 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."
Therefore, relying on the observations and interpretation put on different sections of the Evidence Act and Hindu Marriage Act of 1955, I am of the opinion that the plaintiff has succeeded in proving that at the time of marriage, the defendant was pregnant by somebody else. Therefore, differing from the trial Court, I hold that the child delivered by the defendant-wife was not of the plaintiff-husband, but by somebody else and at the time of the marriage, she was pregnant not by the husband, but by somebody else.
It was further submitted by the learned counsel that this lapse was condoned by the husband and he should have known long before that his wife is pregnant and if he has not taken any fiction on coining to know of this fact, then it should be presumed that the husband has condoned this lapse. But, I do not find any pleading to this effect in the written statement, nor in the statement of the wife. Therefore, this fact cannot be considered as submitted by the learned counsel.

Therefore, the result is that the appeal deserves to be allowed and is allowed and a decree of nullity of marriage u/s 12(1)(d) of the Act is passed in favour of the plaintiff and against the defendant. Looking to the circumstances of the case, there shall be no order as to costs.