SMT. KANTI DEVI AND ANR. A

v.

POSHI RAM

MAY 11, 2001

[K.T. THOMAS AND R.P. SETHI, JJ.] B

Evidence Act, 1872—Sections 4 and 112—Child born after 15 years of marriage—Husband filed a suit for a declaration denying his paternity due to non-access to the wife—Trial Court dismissed suit—First Appellate Court reversed the order finding the presumption successfully rebutted—Interference refused in second appeal as a pure question of fact was involved—On appeal Held, legislative concern is to legitimize a child who should not suffer social disability on account of laches or lapses of parents—Rebutting the presumption is the only outlet to the party to escape conclusiveness of proof, which remains firm even if modern scientific tests prove the contrary—Standard of proof in such cases must be a degree between the test of proof beyond reasonable doubt and preponderance of probabilities—First Appellate Court was fully satisfied while holding that the presumption was successfully rebutted and such a finding cannot be interfered with in second appeal. C D

Words and Phrases—Meaning of "access" in the context of Evidence Act, 1872—Section 112. E

Appellant is the wife of the respondent. They were married in 1975 but remained childless for about 15 years. A lot of matrimonial litigation lingered on between them during this period. However, a child was born to the appellant in 1989. Respondent filed a suit for a declaration that he was not the father of that child, due to non-access to the appellant, rebutting the presumption under Section 112 of the Evidence Act. Trial Court dismissed the suit. First Appellate Court allowed the appeal of the respondent. High Court refused to interfere in the second appeal filed by the appellant as a pure question of fact was involved. Hence this appeal. F G

Appellant contended that First Appellate Court wrongly relied on the interested evidence of the husband that the High Court failed to formulate the substantial question of law as to whether the burden to prove non-access to wife is as heavy as the burden of prosecution in a criminal case to prove H

A the guilt.

Dismissing the appeal, the Court

HELD : 1. The true import of the word "access" in Section 112 of the Evidence Act cannotes only existence of opportunity for marital intercourse. [733-E]

B

Chilukuri Venkateswarlu v. *Chilukuri Venkatanarayan,* [1954] SCR 424, followed.

Karappayya Severai v. *Mayandi,* AIR (1934) PC 49, referred to.

C 2. Section 112 itself provides an outlet to the party who wants to escape from the rigour of conclusiveness of proof under Section 4 of the Act, if it can be shown that the parties had no access to each other at the time when the child could have been begotten. The party who wants to dislodge the conclusiveness and rebut the presumption has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that D she too did not have the opportunity of approaching him during the relevant time. The rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimatizing a child and that he should not suffer social disability on E account of the laches or lapses of parents. [734-A-C]

3. Section 112 was enacted at a time when the modern scientific advancements with Dioxy Nucleic Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate, but even that is not F enough to escape from the conclusiveness of Section 112 of the Act. If a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans G in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. [734-D-E]

4. The standard of proof of prosecution to prove the guilt beyond any reasonable doubt belongs to criminal jurisprudence whereas the test of H preponderance of probabilities belongs to civil cases. The reason for insisting

on proof beyond reasonable doubt in criminal cases is to guard against innocent being convicted and sent to jail if not to extreme penalty of death. It would be too hard if that standard is imported in a civil case for a husband to prove non-access as the very concept of non-access is negative in nature. But at the same time the test of preponderance of probability is too light as that might expose many children to the peril of being illegitimatized. Therefore, by way of abundant caution and as a matter of public policy, law cannot afford to any ill-consequence befalling an innocent child on the strength of a mere tilting of probability. Its corollary is that the burden of the 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 the two as to ensure that there was no possibility of the child being conceived through the husband. [734-G-H; 735-A-B]

Smt. Duktar Jahan **v.** *Mohammed Farooq,* **[1987] 1 SCC 624, followed.**

Goutam Kundu **v.** *State of West Bengal,* **[1993] 3 SCC 418, relied on.**

5. The conclusion rebutting the presumption was reached on the strength of the evidence adduced by both sides and the first appellate court was satisfied in a full measure that the respondent had no opportunity whatsoever to have liaison with the appellant. The finding thus reached by the first appellate court cannot be interfered with in a second appeal, as no substantial question of law would have flowed out of such a finding. [735-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3860 of 2001.

From the Judgment and Order dated 8.9.99 of the Himachal Pradesh High Court in R.S.A. No. 289 of 1999.

Jana Kalyan Das (SCLSC) for the Appellants.

The Judgment of the Court was delivered by

THOMAS, J. Leave granted.

What is the standard of proof required to displace the conclusive presumption in favour of paternity of a child born during the subsistence of a valid marriage? Is it necessary that non-access should be proved beyond reasonable doubt, or would it be sufficient to prove it by a preponderance of probabilities? The maxim "Pater est quem nuptiae demonstrant" (The father is he, whom the nuptials indicate) has gained a sturdy legislative recognition which resulted in the formulation of the rule of evidence envisaged in Section

A 112 of the Evidence Act (for short 'the Act). It is based on the English rule that the child born in the wedlock should be treated as the child of the man who was then the husband of its mother. Its only exception is when the husband proves that he had no access to his wife at the time of conception of that child. Section 112 of the Act reads thus:

B "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 C 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 Section when stretched to its widest compass is capable of encompassing even the birth of a child on the next day of a valid marriage within the range of conclusiveness regarding the paternity of its mother's D husband, but it excludes the birth happened just one day after the period of 280 days elapsing from the date of the dissolution of that marriage. The question regarding the standard of proof for disrupting the conclusiveness of the presumption has been mooted before us as a Single Judge of the High Court of Himachal Pradesh refused to interfere in a second appeal with a finding recorded by the District Judge in a first appeal that the respondent-E plaintiff has discharged his burden of proof and consequently the presumption stood rebutted. The facts which led to the said finding are the following:

The marriage between appellant Kamti Devi and respondent Poshi Ram was solemnised in the year 1975. For almost fifteen years thereafter Kamti Devi remained childless and on 4.9.1989 she gave birth to a male child (his F name is Roshan Lal). The long period in between was marked by internecine legal battles in which the spouses engaged as against each other. Soon after the birth of the child it was sought to be recorded in the Register under the Births, Deaths and Marriages Registration Act. Then the husband filed a civil suit for a decree declaring that he is not the father of the child, as he had G no access to the appellant Kamti Devi during the period when the child would have been begotten.

The trial court, on the basis of admitted facts that the parties are spouses of a valid marriage and that the marriage subsisted on the date of birth of the child, relied on the conclusive presumption mentioned in Section H 112 of the Act. The trial court further held that the husband failed to prove

that he has no access to his wife Kamti Devi during the relevant period. Accordingly the suit was dismissed. A

But the first appellate court, after re-evaluating the entire evidence, found that the husband plaintiff succeeded in discharging the burden for rebutting the presumption by proving that he had no access to the mother of the child during a very long stretch of time covering the relevant period. B On the strength of the said finding the first appellate court allowed the appeal and decreed the suit declaring that the plaintiff is not the father of the child Roshan Lal. The High Court refused to interfere with the aforesaid finding in the second appeal on the premise that "the question whether Roshan Lal is the son of the plaintiff is a pure question of fact which calls for no interference C by the Court in the second appeal under Section 100 of the Code of Civil Procedure.

Learned counsel for the appellant raised two contentions. First is that the District Court went wrong in relying on the interested evidence of the plaintiff. Second is that the High Court failed in formulating the substantial D question of law involved in this case as to whether the burden of a husband-plaintiff (to prove that he had no access to his wife) is as heavy as the burden of prosecution in a criminal case to prove the guilt of the accused.

Earlier there was a controversy as to what is the true import of the word "access" in Section 112 of the Act. Some High Courts held that access means E actual sexual intercourse between the spouses. However, the controversy came to a rest when the privy Council held in *Karapaya Severai* v. *Mayandi,* AIR (1934) PC 49 that the word "access" connotes only existence of opportunity for marital intercourse. The said legal principle gained approval of this Court when a three judge bench had held *Chilukuri Venkateswarlu* F v. *Chilukuri Venkatanarayana,* [1954] SCR 424 that the law has been correctly laid down therein.

When the legislature chose to employ the expression that a certain fact "shall be conclusive proof" of another fact, normally the parties are disabled from disrupting such proof. This can be discerned from the definition of the G expression "conclusive presumption" in Section 4 of the Act.

> "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 H for the purpose of disproving it."

A But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his B wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimatizing a child. It is a sublime public policy C that children should not suffer social disability on account of the laches or lapses of parents.

We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleic Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation D of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This E may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access F or non-access as delineated above.

Whether the burden on the husband is as hard as the prosecution to prove the guilt of the accused in a trial deserves consideration in the above background. The standard of proof of prosecution to prove the guilt beyond any reasonable doubt belongs to criminal jurisprudence whereas the test of G preponderance of probabilities belongs to civil cases. The reason for insisting on proof beyond reasonable doubt in criminal cases is to guard against innocent being convicted and sent to jail if not to extreme penalty of death. It would be too hard if that standard is imported in a civil case for a husband to prove non-access as the very concept of non-access is negative in nature. H But at the same time the test of preponderance of probability is too light as

that might expose many children to the peril of being illegitimatised. If a court declares that the husband is not the father of his wife's child, without tracing out its real father the fall out on the child is ruinous apart from all the ignominy visiting his mother. The bastardized child, when grows up would be socially ostracised and can easily fall into wayward life. Hence, by way of abundant caution and as a matter of public policy, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere tilting of probability. Its corollary is that 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 the two as to ensure that there was no possibility of the child being conceived through the plaintiff-husband.

In *Goutam Kundu* v. *State of West Bengal,* [1993] 3 SCC 418 this Court after considering an early three-Judge Bench decision in *Smt. Dukhtar Jahan* v. *Mohammed Farooq,* [1987] 1 SCC 624 held that "this presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities."

In the present case the first appellate court, which is the final fact finding court, after evaluating the entire evidence, came to the following conclusion:

> "In the present case the plaintiff has examined all the evidence which he possibly could do in the circumstances. He has proved by convincing evidence, that he did not visit his village or house where the defendant was allotted one room. He has further proved that the defendant also never visited him at Mandi where he had been living for more than 2 year before the child was born to Kamti Devi. In other words he has proved that he had no access or opportunity for sexual intercourse with defendant No.1 for more than 280 days before Roshan Lal (defendant No.2) was begotten by the defendant No.1"

The said conclusion was reached on the strength of the evidence adduced by both sides and the first appellate court was satisfied in a full measure that the plaintiff-husband had no opportunity whatsoever to have liaison with the defendant mother. The finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding.

In the result we dismiss this appeal.

A.Q. Appeal dismissed.