

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.53 of 2020

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Shabnam Kumari, Daughter of Sudhir Kumar, Resident of Mohalla- West of
Khandpar Nagar Parishad Office, Sheikhpura, Police Station- Sheikhpura,
District- Sheikhpura.

... .. Appellant/s

Versus

Upendra Kumar, Son of Rajendra Mahto, Resident of Mohalla- Jamalpur,
Police Station- Sheikhpura, District- Sheikhpura.

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. J. S. Arora, Sr. Advocate Mr. Kushagra Kush, Advocate Mr. Manoj Kumar, Advocate
For the Respondent/s	:	Mr. Kamal Nayan Choubey, Sr. Advocate Mr. Ashok Kumar Garg, Advocate Ms. Ritu Priyadarshini, Advocate Mr. Dineshwar Pandey, Advocate Mr. Shashank Shekhar Dubey, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE HARISH KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE HARISH KUMAR)

Date : 11-04-2023

We have heard Mr. J. S. Arora, learned senior counsel with Mr. Kushagrah Kush, learned counsel for the appellant-wife, Mr. K. N. Choubey, learned senior counsel with Mr. Ashok Kumar Garg, learned counsel for the respondent-husband.

2. The present Miscellaneous Appeal is directed against the judgment dated 16.12.2019 whereby the learned Principal Judge, Family Court, Sheikhpura in T.S. (Divorce) Case No. 62 of 2018 has dissolved the marriage



solemnized between the parties by a decree of divorce.

3. The marriage of the appellant/wife and the respondent/husband was solemnized on 13.06.2010. However, it is alleged that the father and other relatives of the wife have fixed the marriage of husband when he was a minor, aged about 15 years, and compelled him to marry with the girl. Hence, the marriage of the respondent was solemnized against his will with the appellant, as per Hindu rituals.

4. After marriage, the appellant came to the house of respondent and begun to live there, however, the wife only lived for three days at the house of the husband and thereafter her parents came and took her to his rental house situated at Hasanganj, Sheikhpura. Thereafter she never returned to the house of husband nor any relationship as wife and husband established between them.

5. It was the case of the husband that the wife thereafter lived along with her parents in a rental house of Munna Rajak since 14.06.2010 to 14.06.2014. He further stated that during this period, the wife developed illicit



relationship with Mukesh Paswan and started living with him as wife and husband, consequently, became pregnant and when the parents of the wife came to know about this fact they left the rental house of Munna Rajak and taken another house on rent. However, Mukesh Paswan used to visit her at the new rental house and their relationship persistently continued and on 26.12.2014 the wife gave birth to a child.

6. The husband protested against the illicit relationship of his wife, for which the parents of wife has also apologized and also promised that the wife will now live with the husband at his home and will have no relationship with Mukesh Paswan. On account of the aforesaid promise and settlement the husband brought the wife to his house and started living as husband and wife, but again the wife came in touch with one Saltu Kumar and developed extra marital relationship; and subsequently left Sheikhpura along with her son and went to Chapra and started living there with Saltu Kumar, as husband and wife.

7. Left with no option, the husband gave a



legal notice to the wife on 03.12.2018, which was returned unserved, whereafter, the application for divorce has been filed on the grounds of adultery and the marriage having been solemnized while the parties were minor.

8. The wife entered her appearance and filed written statement denying the allegation of husband. She contended that her marriage was solemnized with the respondent on 13.06.2010 as per Hindu rites and after marriage she went to her Sasural and lived there for sometimes as wife. Thereafter, her parents got her Bidai done with the consent of parents of husband and taken her to Hasanganj, Sheikhpura at the rental house where the husband was regularly used to visit. The wife, besides several legal pleas, denied the fact that she has any physical relationship with Mukesh Paswan resulting into birth of her son. However, the wife admitted the fact that her father usually remained in different places in connection with his service and whenever he gets time, he used to come to his rental house and lived with the family. The wife also denied the factum of relationship with Saltu Kumar.



9. On the basis of the aforesaid pleadings, the learned Principal Judge, Family Court, inter alia, has framed the issue as to whether the appellant/opposite party has been living in adultery since 14.06.2010 with other persons, namely, Mukesh Paswan and Saltu Kumar and begotten a male child on 26.12.2014, is consequence of adultery and further as to whether the marriage between both the parties is null and void, having been solemnized while they were minor.

10. The husband, who was applicant before the learned Principal Judge, Family Court, Sheikhpura has examined altogether six witnesses. A.W.1 was the respondent/applicant himself, A.W.2 Dharmendra Kumar and A.W.3 Ram Naresh Prasad, were co-villagers, A.W.4 Rajendra Mahto happens to be the father of the respondent, A.W. 5 Ajay Kumar Sinha and A.W.6 Janki Mahto were the neighbours of the husband.

11. On the other hand, the appellant, who was opposite party before the learned Principal Judge, Family Court has examined five witnesses in support of her



contention. O.P.W.1 Shabnam Kumari was the wife herself, O.P.W.2 Parvati Devi happens to be the mother of the wife, O.P.W.3 Anil Prasad, one of the relative of the wife, O.P.W.4 Madhuri Devi was the cousin sister of the wife and O.P.W.5 Devnandan Prasad happens to be the maternal uncle of the wife.

12. The husband in his deposition supported his case and also admitted during his cross-examination that having solemnized marriage on 13.06.2010 with the appellant as per Hindu rites, she came to his house and lived their for three days and thereafter she returned to her Maika. However, at that point of time he was only fifteen years. During her stay at Sasural no physical relation was established between them because the appellant/opposite party was not ready to live there. He further deposed that after three days the appellant/opposite party came to her Maika and lived there at Hasanganj in her rental house, thereafter she never returned to his house and continued to live in her rental house, where she developed illicit relationship with Mukesh Paswan, who was also a renter in



the said house and that relationship continued till 2015-16. He also deposed that on account of illicit relationship of appellant/opposite party with Mukesh Paswan, a son was also begotten on 26.12.2014, due to which a Panchayati also took place, but despite Panchayati the appellant/opposite party did not return to his house and later on she went along with Saltu Kumar and she is living with him. He also deposed that he has made several efforts to bring his wife back but she was not ready to return.

13. A.W.2 and A.W.3 during their examination-in-chief also supported the factum of marriage between the parties as per Hindu rites. Both of them in their deposition stated that the wife lived their only for 2-4 days and thereafter she returned to her Maika and never returned to the house of husband and thereafter there is no relation between the parties since then. Both of them also supported the case of the illicit relation of the wife with Mukesh Paswan and asserted that the son born to the wife is certainly on account of illicit relationship.

14. A.W.2, apart from the aforesaid



deposition, in his cross-examination stated that whatever he deposed against the appellant/opposite party in his examination-in-chief that was seen by him from his own eyes and he further stated that the wife is now a days living with Saltu Kumar and she did not even stand on the decision of the Panchayati.

15. A.W.4, the father of the respondent/ husband also, likewise, supported the case of the husband and said that his daughter-in-law was living in a rental house at Sheikhpura and thereafter she never returned to his house. He further deposed that his son has never lived with his wife and he also came to know that she is living with Mukesh Paswan. He further deposed that wife started working in Ultrasound clinic and thereafter she fled away somewhere along with Saltu Kumar.

16. A.W. 5 besides, supported the case of the applicant/husband also deposed that wife was in illicit relationship with Mukesh Paswan and a male child was born to the wife due to said illicit relationship; Panchayati was held in which the father of the wife accepted the fact



and said that the child is born from the relationship with Mukesh Paswan.

17. A.W.6, happens to be the neighbour of the husband, supported the stand of the husband and stated that the wife came to the house of respondent and lived there for four days and thereafter she went to her Maika and never returned to her Sasural. This witness also supported that the wife had illicit relationship with Mukesh Paswan.

18. On the other hand, the appellant/ wife admitted the marriage with the husband on 13.06.2010 and contended that she went to her Sasural and she lived there happily for 11 days and thereafter she went to her Maika. She further stated that her husband used to visit regularly to her house and it is wrong to say that the son is the result of illicit relationship. She categorically denied the fact that she worked in Nalanda Ultra Sound and went to Chapra at any time. In support of her good relationship with husband, she has filed some photographs of herself, her father, her husband and other family members of the family taken out in January to February, 2019, which were exhibited and



marked as Y, Y/1, Y/2, Y/3, Y/4 and Y/5. The wife in her cross- examination admitted that during her marriage, her father was residing in the house of Munna Rajak and they lived in the said house for five years and Mukesh Paswan was the renter in that house. She further stated that she has gone for her test along with her mother during her pregnancy at Manju Bhadani clinic but shown her inability to produce any paper. In her cross-examination, she has stated that she remained in the hospital for three days and after being discharged on 29.12.2013 she did not go to her residence situated at Khaandpar. She further stated that no photograph of any of the child, either of the birth day function was taken and she has been living separately from her husband since 2018.

19. O.P.W.2, the mother of the wife, denied all the allegation and said that after birth of the child, the husband started demanding money to the tune of Rs. 2,00,000/-. She further stated that Chathhi of the child was performed and she also went there in the ceremony, but there is no photograph for the said ceremony.



20. O.P.W.3, the relative of the wife, also supported that the wife was in her Sasural and had good relation with her husband.

21. O.P.W.4, the cousin sister of wife, in her cross-examination said that the wife was living with her father at Dallu Chowk on a rental house and there were some other renters in that house but she shown her ignorance about any illicit relationship with Mukesh Paswan.

22. O.P.W.5, who is said to be the maternal uncle of the wife, supported the marriage of the appellant with the respondent in the year 2010. However, he said that now the appellant is living in her Maika since 2018. He completely denied the charges levelled by the husband against the appellant/ wife. He also shown his ignorance whether any other renters were living in the rented house or not.

23. On the basis of the aforesaid evidences of the parties, the learned Principal Judge, Family Court, Sheikhpura came to the conclusion that the applicant/



respondent and his witnesses deposed that the appellant/wife came to the house of the respondent after marriage and lived there for 3-4 days only and thereafter she returned to her Maika and since then she never came back to the house of the husband. This fact has also not been denied during the cross-examination and the wife herself being O.P.W.1 deposed in her examination that she lived there only for 11 days and thereafter she never went to her Sasural from her Maika. The learned Principal Judge, Family Court also came to the conclusion that the allegation of applicant/husband that opposite party/wife is living in adultery with Mukesh Paswan is proved, inasmuch, as Mukesh Paswan was also the renter in the same house where opposite party/wife was living. It is also admitted by the opposite party/wife that the male child was born on 26.12.2014 after four years from the wedlock of the applicant/husband, but she failed to prove that the applicant/respondent used to visit her regularly at her Maika, though she has to establish the fact that her son is born by her legal wedlock from the applicant/ husband, in oppose to the allegation of adultery. In view thereof, the



learned court concluded that the opposite party/wife is living in adultery with Mukesh Paswan and Saltu Kumar and the birth of her child on 26.12.2014 is also the result of the illicit relationship and accordingly, the issue is decided positively in favour of the husband.

24. Further, with regard to the issue of minority at the time of marriage, the court below concluded that the applicant/respondent had filed a photo copy of transfer certificate issued from the District Superintendent of Education, Sheikhpura wherein the date of birth of the applicant was written as 10.04.1996 and the marriage was solemnized between them on 13.06.2010. No other birth certificate of the application/husband or the opposite party/wife is filed by the opposite party nor the date of birth of the applicant/husband is denied. Hence, the learned court held that the applicant/ husband was a minor at the time of marriage, aged about 15 years,, which ground is also found good for declaring his marriage to be null and void and, accordingly, the said issue is also decided positively. Consequently, the respondent-husband is found entitled to



get a decree of divorce from the appellant-wife and accordingly, the impugned judgment and decree came to be passed.

25. Being aggrieved by the aforesaid, the wife preferred this appeal on the ground that the learned Principal Judge, Family Court failed to appreciate that the averments of the husband that the wife stayed in his house only for three days and thereafter relationship as wife and husband never established between them, is without any evidence and such averments could not have been relied upon unless and until the husband discharged his burden of proof by furnishing legal evidence in support of such pleading.

26. The impugned judgment has also been challenged on the ground that the learned Family Court failed to examine the question whether the husband had access to the wife or not during the period, when she had conceived. Section 112 of the Evidence Act, which in no uncertain terms provides that once the validity of marriage is proved, then there is strong presumption of the legitimacy



of the child born out of that wedlock. This presumption can only be refuted by a strong, cogent and conclusive evidence. The said presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt.

27. Challenge has also been made on the ground that the alleged minority of the respondent at the time of marriage becomes irrelevant, if after attaining majority both continued as husband and wife and, in the instant case the marriage took place on 13.06.2010, whereas the matrimonial case was filed in 2018.

28. In order to dispel the aforesaid contention, Mr. K. N. Choubey, learned senior counsel for the respondent, submitted that the impugned judgment has been passed taking into consideration the evidences of witnesses, who ably proved the fact that the wife left her Sasural just after few days and thereafter she returned back to her Maika and started living in a rental house and there had not been been any relationship of husband and wife between the parties and the witnesses have consistently stated that the



wife was living with Mukesh Paswan, and a son was also born to her from the relationship with Mukesh Paswan and further there is no rebuttal that the respondent was minor at the time of solemnization of marriage. Hence, there is no infirmity in passing the judgment under appeal.

29. This Court has given careful consideration to the submissions of learned counsel for the parties and has also perused the materials available on record.

30. Before parting with the final outcome, it would be prudent to note the extract of Section 112 of the Evidence Act hereinbelow:

“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.”



31. The mere fact that a woman is living in a house separate from that of her husband is having relations with other man is not sufficient to rebut the conclusive presumption of legitimacy, which is raised by Section 112 of the Evidence Act, unless it is proved that the wife and husband has no access to each other in the period indicated in the Section. The Hon'ble Supreme Court in the case of *Badri Prasad Vs. Director of Consolidation & Others*, (1978) 3 SCC 527 laid down that “a strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. If men and women who live as husband and wife in society are compelled to prove, half a century later, by eyewitness evidence that they were validly married, few will succeed.”

32. In **Kamti Devi Vs. Poshi Ram**, (2001) 5 SCC 311, the Hon'ble Supreme Court has held that Section 112 which raises a conclusive presumption about the paternity of the child born during the subsistence of a valid marriage, 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.

33. The Apex Court in the case of **Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia (Arising out of SLP (Civil) No. 9855 of 2022)**, while considering the issue regarding necessity of DNA test of a minor child has been pleased to take note of the interest of the child, held that children have the right not to have their legitimacy questioned frivolously in Courts of Law and cautioned that the Courts are required to acknowledge that children are not to be regarded like material objects, and be subjected to forensic/DNA testing, particularly when they are not parties to the divorce proceeding. It is imperative that children do not become the focal point of the battle between spouses. This implies that the interest of the child should be given primary consideration in actions involved in the children.

34. The learned counsel for the appellant has rightly relied upon a decision rendered by the Hon'ble Supreme Court in the case of **Shyam Lal @ Kuldeep Vs.**



Sanjeev Kumar and Ors, (2009) 12 SCC 454, holding that once the validity of marriage is proved then there is strong presumption of legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt.

35. Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy, if husband has had access.

36. The learned Supreme Court further observed that it is undesirable to enquire into paternity of a child whose parents “have access” to each other. Section 112 of the Evidence Act is based on presumption of public morality and public policy. It is well-settled principle of law that *odiosa et inhonesta non sunt in lege praesumenda* (nothing odious or dishonourable will be presumed by the law). Section 112 reproduces the rule of English Law that it is undesirable to enquire into the paternity of a child when



the mother is a married woman and the husband had access to her. The law presumes against vice and immorality. In a civilized society it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents had “access” to each other.

37. In the instant case, admittedly the child was born to the appellant during the continuance of her valid marriage with respondent and there is no cogent evidence on record that husband at any point of time did not have access to wife.

38. It can further simply be said that if one of the party to the marriage shows that he/she had no access to other at the time when child could have been begotten, Section 112 of the Evidence Act does not get attracted. On the contrary, if the parties have had access to each other at the relevant point of time, the fate of the question relating to legitimacy is sealed.

39. This Court further finds that the learned Family Judge while deciding the issue has wrongly shifted the burden of proof to the wife to prove this fact that the



child was not born by illicit relation but with her legal wedlock from the husband, even before the respondent is able to dislodge the presumption under Section 112 of the Evidence Act, inasmuch, as both the husband and wife are residing in the nearby place in same district and the evidences have come that the husband used to visit her house regularly and there has been good relationship even after the birth of the child.

40. Further this Court finds that on the issue of minority the learned Family Court failed to consider that the alleged minority of the parties to the marriage at the time of marriage becomes irrelevant. Such marriage is voidable under Section 12 of the Hindu Marriage Act dependent at the option of the parties to challenge the validity of the marriage after attaining the age of the majority within three years from the date of attaining the majority. However, in the instance case, the marriage took place on 13.06.2010 and the Matrimonial case was filed in the year 2018. Thus the plea of minority is not available to the husband.



41. In view of the aforementioned legal proposition in the present factual premise, this Court finds it difficult to dislodge the presumption under Section 112 of the Evidence Act; as the materials available on record shows the parties have had access to each other. Thus, the impugned judgment dated 16.12.2019 passed by the learned Principal Judge, Family Court, Sheikhpura in T.S. (Divorce) Case No. 62 of 2018 is not found to be sustainable and is set aside. The matter is remitted to the Principal Judge, Family Court, Sheikhpura for reconsideration in the light of the proposition of law and the discussions made herein before.

(Harish Kumar, J)

(Ashutosh Kumar, J)

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