

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No. 287 of 2019

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Sunny Devi, W/o Ram Babu Kumar, D/o Sudish Prasad, Vill.- Mallahi
Bazar, P.O. and P.S.- Malahi, Distt.- East Champaran

... .. Appellant/Defendant

Versus

Ram Babu Kumar, S/o Mahanth Prasad, Vill.- Sunarpur, P.S.- Branjariya,
Distt.- East Champaran at present resident in Vill.- Singhiya Hiwan
Branjariya Distt.- East Champaran

... .. Respondent/Plaintiff

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Appearance :

For the Appellant/s : Mr. Shiva Shankar Sharma, Advocate
For the Respondent/s : Mr. Abhishek Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE JITENDRA KUMAR)

Date : 15-09-2023

The present appeal has been filed under Section 19 of the Family Courts Act, 1984 impugning the judgment dated 18.04.2019, passed by Ld. Principal Judge, Family Court, East Champaran, Motihari in Matrimonial (Divorce) Case No. 250 of 2012, whereby the petition, filed by the Plaintiff-Respondent under Section 12(d) of the Hindu Marriage Act, 1955 praying for decree of nullity for annulment of marriage between the parties, has been allowed on contest.

2. The case of the Plaintiff-Respondent, as per the



petition filed before the Family Court, is that marriage between the parties was solemnized on 19.04.2012 at the Village Malahi Bazar situated in the District East Champaran as per Hindu rites and customs. The parties had last resided together at Sunarpur located in the local jurisdiction of the Family Court, East Champaran, Motihari. It is also averred that there is no petition filed by the Plaintiff-Respondent prior to the present petition and there was no collusion between the parties to present the matrimonial petition. It is further averred that following the marriage, the Defendant-Appellant joined his matrimonial house. It is further averred that soon the Defendant-Appellant began to misbehave with the Plaintiff-Respondent and disliked his company and also refused cohabitation with him. It is further averred that on 30.04.2012, the Plaintiff-Respondent had seen various symptoms of Defendant-Appellant being pregnant. The Defendant-Appellant tried to live lonely with an intent to suppress the sign of pregnancy. It is further averred that the Plaintiff-Respondent, having seen abnormality of physique and behaviour of the Defendant-Appellant, got pregnancy test of the Defendant-Appellant conducted, which was found positive. It is further averred that the Defendant-Appellant



herself confessed her guilt and admitted illicit relationship with other person prior to the marriage. It is further averred that on complaint on 07.06.2012, the father and brother of the Defendant-Appellant came Singhiya Hiwan and asked the Plaintiff-Respondent that his suspicion is wrong and they advised him to get the ultrasound test of the Defendant-Appellant conducted. As per advice, ultrasound test of Defendant-Appellant was conducted on 08.06.2012 at HI Tec Scan Centre Janpul Chowk, Motihari and the report of the ultrasound revealed that the age of fetus is eight weeks, meaning thereby that the child was conceived prior to the date of marriage, in spite of the fact that the petitioner never met the respondent before the marriage. It is further averred that after ultrasound report, the brother and father of the Defendant-Appellant took her with them to their home and this time, the Defendant-Appellant took away all her ornaments and other belongings along with herself. Hence, he claims that marriage is voidable and fit to be annulled on the ground of pregnancy since prior to the marriage with a person other than the Plaintiff-Respondent-husband. Hence, the Plaintiff-Respondent prayed for decree of nullity for annulling the marriage between the parties.



3. On notice, the Defendant-Appellant appeared before the Family Court and filed her written statement wherein she has denied all the allegations made against her and she has claimed that just next day of the marriage there was physical relationship between the parties, leading to her pregnancy. She has further averred that marriage was solemnized on 19.04.2012 and a female child was born on 22.01.2013, which clearly shows that allegation against the Defendant-Appellant is false. She has further deposed that the child was born in Referral Hospital, Areraj. She has further averred that after ousting by Plaintiff-Respondent, she was living at her Mayake. She has further claimed that on account of his illicit relationship with Sunit Devi, who is the wife of his brother Sugrim Prasad, this baseless allegation has been levelled against her. She has also claimed that after the ultrasound report, the Plaintiff-Respondent came to know that child is female, he pressurized her for abortion, but she was not ready for abortion and hence, false allegation has been levelled against her. It is also alleged that there was illegal demand of dowry and on account of non-fulfillment of the same, she was ousted from the matrimonial house on 12.09.2012 and hence, a complaint was lodged on 20.12.2012.



She has further claimed that she had never sexual relationship with anybody prior to the marriage with the Plaintiff-Respondent and she has prayed that the petition is liable to be dismissed with cost.

4. On the basis of the pleadings of the parties, following issues were framed by Ld. Family Court:

(i) Whether the petition, as framed, is maintainable.

(ii) Whether the Defendant was pregnant by other person prior to the marriage and it was not in the knowledge of the Plaintiff.

(iii) Whether the Plaintiff established physical relationship with Defendant after knowledge of her pregnancy.

(iv) Whether the Plaintiff is entitled to any relief.

5. During trial, the Plaintiff-Respondent examined himself as a sole witness, whereas, the Defendant-Appellant had also examined herself as a sole witness in defence of her case.

6. The sole Plaintiff witness Ram Babu Kumar, who is Plaintiff himself has been examined as P.W.-1. In his



examination-in-chief, he has reiterated his statement as made in his petition. In his cross examination, he has deposed that Defendant-Appellant is not at his home nor will he keep her at his home. Defendant-Appellant has one daughter, who was born after the marriage. He had denied the allegation that he has ousted his wife after beating and snatching her belongings. He admits that Defendant-Appellant has lodged a case against him. However, he claims that he has lodged his case prior to her. He has also deposed that he is ready for DNA test of the child. He denied the allegation that he has illicit relationship with his Bhabhi. He has also admitted that he has no knowledge that with whom, his wife has illicit relationship. He has also admitted that he has not seen the illicit relationship of his wife with anybody with his own eyes. He has also deposed that he cannot tell the names of those persons who have told him about bad character of his wife. He has further deposed that he is a Government Teacher and his wife is living at her Mayake. He has also deposed that his father-in-law is no more and the Defendant-Appellant-wife is living with her mother. He has also deposed that he is able to maintain his wife, however, his wife is leading a miserable life at her Mayake. He has further deposed that he gets salary of ₹19,000/- per month.



He has further deposed that he is not aware whether his wife has entered into second marriage. He wants to get rid of her so that he can re-marry. He also denied the allegation that he has filed this petition for the purpose of re-marriage.

7. Defendant Sunny Devi has examined herself as a sole Defendant witness to support her case. Her examination-in-chief has been filed by way of affidavit. In the said affidavit, she has reiterated her statement as made in her written statement. She has also deposed that her daughter is presently five years old. She has also deposed that she has filed maintenance case bearing No. 312 of 2014, as well as harassment case bearing no. 14 of 2017, which is presently pending in the court of Ld. ACJM, Motihari. She has also deposed that she has got an order of court for payment of maintenance of ₹5,000/- per month for herself and her daughter and the same is being paid by her husband. She has further deposed that for her and her daughter, nobody is there to look after except her husband because her father has already died.

7(i) In her cross-examination, she has deposed that she is separate from her husband for last five years and she has lodged criminal case for harassment and her husband



has gone to jail also in that regard. She has also deposed that her father-in-law has been murdered and she has lodged a murder case against her husband and his family members. She has further deposed that she does not get payment of maintenance regularly. Sometimes, she gets payment, but sometimes not.

8. After considering the evidence on record and submission advanced on behalf of both the parties, the petition of the petitioner has been allowed declaring the marriage between the parties void finding that the marriage between the parties was solemnized on 19.04.2012 and after the marriage the Appellant-wife joined the Respondent-husband at his matrimonial home and on doubt expressed by Respondent-husband, ultrasound was conducted on the Appellant-wife on 08.06.2012 to test her pregnancy and as per the ultrasound report, she was found to be pregnant of eight weeks. It has further been found that after the ultrasound, the Appellant-wife was taken by her brother and father to their house. It has been further found by the Ld. Family Court that on 08.06.2012, two months of living of the Appellant-wife at matrimonial home was not complete and hence the Appellant-wife being pregnant of two months clearly shows that she was pregnant since prior



to the marriage. The Respondent-husband was not aware of this pregnancy at the time of marriage. It has also been found that prior to the marriage there was no cohabitation between the parties. Hence, on the basis of ultrasound report, Ld. Family Court came to the conclusion that she was pregnant since prior to the marriage with a person other than the Respondent-husband. Hence, marriage was declared null and void by decree of nullity.

9. Ld. counsel for the Appellant submits that the Ld. Family Court has failed to properly appreciate the facts and law and hence court has reached the erroneous conclusion. He further submits that in this case though the legitimacy of the child is not expressly involved but the finding of the court on the issue involved is bound to have serious repercussions for the wife as well as the child. He further submits that the Ld. Family Court has failed to appreciate that pregnancy test by ultrasound cannot precisely find the exact date of conception of the child. He further submits that the child is born within 278 days of the Appellant-wife joining the Respondent-husband at the matrimonial home after marriage i.e. on 20.04.2012 and there was cohabitation between them since then till 12.09.2012, when she was ousted by him. He



further submits that female child was born on 22.01.2013, i.e., within 278 days of first cohabitation between the parties and as such as per Section 112 of the Evidence Act, there is conclusive proof that the child is born to the parties. This conclusive proof has not been rebutted by the Respondent-husband by proving non-access to the Appellant-wife. Only statement of the husband that he has never cohabited with the Appellant-wife, is not sufficient to discharge the onus to prove non-access.

10. However, Ld, counsel for the Respondent-husband defends the judgement passed by the Ld. Family Court saying that in view of the ultrasound report, the child was not conceived during the marriage and the Appellant-wife was carrying pregnancy since prior to the marriage and hence there is no illegality committed by the Ld. Family Court while allowing the petition filed by the Respondent-husband and declaring the marriage void by decree of nullity.

11. In view of the submissions of the parties, the following points arise for determination by this Court:

(i) Whether the Appellant-wife was at the time of marriage pregnant by some person other than Respondent-husband.



(ii) Whether the Respondent-husband is entitled to get his marriage with the Appellant declared as null and void by decree of nullity under Section 12(1)(d) of Hindu Marriage Act.

12. Before we proceed to discuss the points arising for determination, it is imperative to see case laws or authoritative Judicial Pronouncements regarding Burden of Proof and Standard of Proof in matrimonial cases.

13. Hon'ble Supreme Court has elaborately discussed the nature of **burden of proof** in matrimonial cases in **Dr. Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane** as reported in **1975 (2) SCC 326** and law laid down herein is still holding the field. In para 23 of the case, **the Hon'ble Apex Court** has observed that, doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with commonsense as it is so much easier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty.

14. Coming to the **Standard of Proof**, we find that some misconception had arisen on account of the use of



the words “Matrimonial Offences” to describe the misconducts of Defendants under the Hindu Marriage Act. That is why before authoritative decision of **Hon'ble Full Bench of the Supreme Court** in **Dr. Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane** as reported in **1975 (2) SCC 326**, there were conflicting views. As per one view, matrimonial cases are of civil nature and hence standard of proof in such cases would be preponderance of probabilities whereas, as per the another view, proof beyond reasonable doubt should be standard of proof in matrimonial cases in view of the use of word “matrimonial offences” in Hindu Marriage Act. However, in **Dr. Narayan Ganesh Dastane case** (supra), **Hon'ble Full Bench of the Supreme Court** clearly held that matrimonial cases are civil in nature and preponderance of probabilities will be standard of proof in trial of Matrimonial cases under the Hindu Marriage Act, and not proof beyond reasonable doubt which is applicable in criminal trials. **Hon'ble Supreme Court**, in para 24 of **Dr. Narayan Ganesh Dastane case** (supra) observed that the normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a



fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.



15. Ruling out application of “proof beyond reasonable doubt” in matrimonial cases, **Hon’ble Supreme Court**, in para 25 of **Dr. Narayan Ganesh Dastane case** (supra) has observed that the proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so nicely balanced that a reasonable, not a vacillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature. In para 26 of **Dr. Narayan Ganesh Dastane case** (supra), **Hon’ble Apex Court** has further observed that under the Hindu Marriage Act, nowhere it is required that the petitioner must prove his case beyond reasonable doubt. Section 23 confers on the court the power to pass a decree if it is “satisfied” on matters mentioned in clauses (a) to (e) of its sub-section of (1). Considering that proceedings under the Act are essentially of a civil nature, the word “satisfied” must mean “satisfied on a preponderance of



probabilities” and not “satisfied beyond a reasonable doubt”.

Section 23 does not alter the standard of proof in civil cases.

16. Hon’ble Supreme Court, in para 27 of **Dr. Narayan Ganesh Dastane case** (supra) has further observed that the misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a “matrimonial offence”. Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance. To marry or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

17. Hon’ble Apex Court in para 10 of **Shobha Rani Vs. Madhukar Reddi** as reported in **AIR 1988 SC 121** has also observed that considering that proceedings under the Hindu Marriage Act is essentially of a civil nature, the word



‘satisfied’ must mean ‘satisfied on a preponderance of probabilities’ and not ‘satisfied beyond a reasonable doubt’. Section 23 of the Act does not alter the standard of proof in civil cases.

18. Hon’ble Supreme Court in para 10 of **A. Jayachandra Vs. Aneel Kaur** as reported in **2005(2) SCC 22** has observed that in a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in



matrimonial disputes.

19. Hon'ble Kerala High Court, after referring to **A. Jayachandra case** (supra), in para 19 of **Mohandas Panicker Vs. Dakshayani** as reported in **2013 SCC Online Ker 24493** has observed that the principles laid down in the above decisions reiterate that in civil cases, preponderance of probabilities is the standard to be adopted to prove the case. No doubt, matrimonial cases are civil proceedings and the Court can act upon preponderance of probabilities, especially in adultery cases, since it is difficult to get direct evidence.

20. Now let us consider the points which have been formulated for determination.

Point No.1

21. Before we consider this point, it would be pertinent to refer to the relevant statutory provisions.

22. Section 12 of the Hindu Marriage Act :

“12. Voidable marriages.—

(1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds,namely:—

(a)

(b)

(c)

(d) that the respondent was at the time of the



marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-sec. (1), no petition for annulling a marriage—

(a)

(b) on the ground specified in clause (d) of sub-sec. (1) shall be entertained unless the court is satisfied—

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.”

23. As such, under Section 12(1)(d) of the Hindu Marriage Act, the marriage may be annulled by a decree of nullity if the Respondent was pregnant at the time of the marriage by some person other than the petitioner. Three conditions are however to be satisfied which are mentioned in Sub-clauses (i) to (iii) of Clause (b) of Sub-sec. (2) of Section 12 of the Hindu Marriage Act. Those conditions are: (i) that the Petitioner was at the time of marriage ignorant of the facts



alleged, (ii) that the proceedings have been instituted in the case of marriage solemnized before the commencement of the Act within one year of such commencement and in the case of marriage solemnized after the commencement of the Act within one year from the date of the marriage. Thus, a period of limitation is fixed for filing an Application under this Clause, (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground

24. Compliance of the aforesaid conditions is a condition precedent for annulment of marriage under this clause. However, in the present case at hand, there is no dispute regarding ignorance of alleged pregnancy of the Appellant-wife and the limitation to file this petition. As such, we are only required to see whether Respondent – husband has proved that Appellant – wife was pregnant at the time of marriage and whether there was marital intercourse with the consent of the husband-Petitioner, who is Respondent herein, after discovery of alleged pregnancy.

25. Before we proceed to consider the evidence on record in this regard, it would be also imperative to refer to Section 112 of the Evidence Act, which comes into play as the



finding on the issue has direct bearing on the legitimacy of the child.

26. Section 112 of the Evidence Act, 1872 :-

“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.”

27. Hon’ble Apex Court in para 34 of **Aparna Ajinkya Firodia v. Ajinkya Arun Firodia**, as reported in **2023 SCC OnLine SC 161** has observed that Section 112 embodies the rule of law that the birth of a child during the continuance of a valid marriage or within 280 days (i.e., within the period of gestation) after its dissolution shall be “conclusive proof” that the child is legitimate unless it is established by evidence that the husband and wife did not or could not have any access to each other at any time when the child could have been conceived. The object of this provision is to attach unimpeachable legitimacy to children born out of a



valid marriage. When a child is born during the subsistence of lawful wedlock, it would mean that the parents had access to each other. Therefore, the Section speaks of “conclusive proof” of the legitimate birth of a child during the period of lawful wedlock.

28. In para 35 of **Aparna Ajinkya Firodia case (supra)** Hon’ble Apex Court has further observed that the latter part of the Section is with reference to proof of the non-access of the parents of the child to each other. Thus, the presumption of legitimacy of the birth of the child is rebuttable by way of strong evidence to the contrary.

29. In para 36 of **Aparna Ajinkya Firodia case (supra)**, Hon’ble Supreme Court has further observed that the principle underlying Section 112 is to prevent an unwarranted enquiry as to the paternity of the child whose parents, at the relevant time had “access” to each other. In other words, once a marriage is held to be valid, there is a strong presumption as to the children born from that wedlock as being legitimate. This presumption can be rebutted only by strong, clear and conclusive evidence to the contrary. Section 112 of the Evidence Act is based on the presumption of public morality and public policy.



30. In para 37 of **Aparna Ajinkya Firodia case (supra)**, **Hon'ble Apex Court** has further observed that “access” or “non-access” does not mean actual cohabitation but means the “existence” or “non-existence” of opportunities for sexual relationship. Section 112 refers to point of time of birth as the crucial aspect and not to the time of conception. The time of conception is relevant only to see whether the husband had or did not have access to the wife. Thus, birth during the continuance of marriage is “conclusive proof” of legitimacy unless “non-access” of the party who questions the paternity of the child at the time the child could have been begotten is proved by the said party.

31. In para 38 of **Aparna Ajinkya Firodia case (supra)**, **Hon'ble Apex Court** has further observed that a conjoint reading of Section 112 of the Evidence Act, with the definition of “conclusive proof” under Section 4 thereof, makes it amply clear that a child proved to be born during a valid marriage should be deemed to be a legitimate child except where it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten or within 280 days after the dissolution of the marriage and the mother remains unmarried, that fact is the



conclusive proof that the child is the legitimate son of the man. Operation of the conclusive presumption can be avoided by proving non-access at the relevant time.

32. In para 39 of **Aparna Ajinkya Firodia case (supra)**, **Hon'ble Apex Court** has further observed that the latter part of Section 112 of the Evidence Act indicates that if a person is able to establish that the parties to the marriage had no access to each other at any time when the child could have been begotten, the legitimacy of such child can be denied. That is, it must be proved by strong and cogent evidence that access between them was impossible on account of serious illness or impotency or that there was no chance of sexual relationship between the parties during the period when the child must have been begotten. Thus, unless the absence of access is established, the presumption of legitimacy cannot be displaced.

33. In para 40 of **Aparna Ajinkya Firodia case (supra)**, **Hon'ble Apex Court** has further observed that thus, where the husband and wife have co-habited together, and no impotency is proved, the child born from their wedlock is conclusively presumed to be legitimate, even if the wife is shown to have been, at the same time, guilty of infidelity. The



fact that a woman is living in adultery would not by itself be sufficient to repel the conclusive presumption in favour of the legitimacy of a child. Therefore, shreds of evidence to the effect that the husband did not have intercourse with the wife at the period of conception, can only point to the illegitimacy of a child born in wedlock, but it would not uproot the presumption of legitimacy under Section 112.

34. In para 41 of **Aparna Ajinkya Firodia case (supra)**, **Hon'ble Apex Court** has further observed that the presumption under Section 112 can be drawn only if the child is born during the continuance of a valid marriage and not otherwise. "Access" or "non-access" must be in the context of sexual intercourse that is, in the sexual sense and therefore, in that narrow sense. Access may for instance, be impossible not only when the husband is away during the period when the child could have been begotten or owing to impotency or incompetency due to various reasons or the passage of time since the death of the husband. Thus, even though the husband may be cohabiting, there may be non-access between the husband and the wife. One of the instances of non-access despite co-habitation is the impotency of the husband. If the husband has had access, adultery on the wife's part will not



justify a finding of illegitimacy.

35. In para 43 of **Aparna Ajinkya Firodia case (supra)**, **Hon'ble Apex Court** has further observed that even the result of a genuine DNA test cannot escape from the conclusiveness of the presumption under Section 112 of the Evidence Act. If a husband and wife were living together during the time of conception but the DNA test reveals that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. What would be proved, is adultery on the part of the wife, however, the legitimacy of the child would still be conclusive in law. In other words, the conclusive presumption of paternity of a child born during the subsistence of a valid marriage is that the child is that of the husband and it cannot be rebutted by a mere DNA test report. What is necessary to rebut is the proof of non-access at the time when the child could have been begotten, that is, at the time of its conception.

36. **Hon'ble Apex Court** in para 18 of **Thatchinamoorthy Vs. Sivagamy** as reported in **2010 (2) MWN (Civil) 337** has observed that law presumes strongly in favour of legitimacy of off-spring. Section 112 of Evidence Act embodies a rule of law that a child born during the



continuance of a valid marriage or during 280 days (within the period of gestation), it shall be conclusive proof that it is legitimate unless it is proved by clear and strong evidence that the husband and wife did not and could not have any access at any time when the child could have been begotten.

37. Hon'ble Apex Court in para 9 of **Sham Lal Alias Kuldip Vs. Sanjeev Kumar & Ors.** as reported in **(2009) 12 SCC 454** has observed that Section 112 of the Evidence Act is based on English Law. Section 112 reproduces the rule of English Law that it is undesirable to inquire into the paternity of a child when the mother is a married woman and the husband had access to her. Adultery on her part will not justify finding of illegitimacy if husband has had access.

38. Hon'ble Apex Court in para 10 of **Kamti Devi (Smt) & Anr. Vs. Poshi RAM** as reported in **(2001) 12 SCC 311** has observed that we may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic 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 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 irrebuttable. 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 in favour of the innocent child from being bastardised 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 or non-access as delineated above.

39. Hon'ble Apex Court in para 21 of **Goutam Kundu Vs. State of West Bengal & Anr.** as reported in **(1993) 3 SCC 418** has observed that this section is based on the well-known maxim *pater est quem nuptiae demonstrant* (*he is the father whom the marriage indicates*). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, and that every person is



legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality.

40. In para 22 of **Goutam Kundu case (supra)**, **Hon'ble Apex Court** has further observed that it is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

41. **Hon'ble Apex Court** in para 12 of **Smt. Dukhtar Jahan Vs. Mohammed Farooq** as reported in **(1987) 1 SCC 624** has observed that another serious infirmity noticed in the judgment is that the learned Judge has completely lost sight of Section 112 of the Indian Evidence Act. Section 112 lays down that if a 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 and the mother remains unmarried, it shall be taken as 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. This rule of law based on the dictates of justice has



always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman.

42. Hon'ble Madhya Pradesh High Court in Nandkishore Vs. Smt. Munnibai as reported in **1981 Madhya Pradesh Series 585** has observed that imputing unchastity to a woman is charge of a very serious nature. The charge, if established, may result in serious consequences. Not only that such a woman be condemned in the society and be lowered in the eyes of her relatives and associates, but may also suffer a child, if any, being called a bastard. It shall, therefore, be just to seek for a more cogent and convincing evidence in such cases than the one which may only be sufficient to create a doubt.

43. Hon'ble Apex Court in para 160 of **Mahendra Manilal Nanavati Vs. Sushila Mahendra**



Nanavati as reported in **AIR 1965 SC 364** has observed that the notional period of pregnancy is calculated from the first day of the menstruation preceding the conception and it is on this account that 14 days are added to the period of pregnancy from the actual date of conception. On the basis of notional calculation, the fully mature child is born after 280 days. On the basis of the date of conception, the child is born between 265 and 270 days. The development of the foetus undoubtedly depends on its age as counted from the date of conception and it is for this reason that the books on obstetrics mostly deal with the development of the foetus on the basis of days or weeks after conception, for a period of about two months and thereafter they began to note its development with respect to the end of the third and consecutive months. This must be due to the fact that by that time a difference of about a fortnight in the period of gestation does not bring about a substantial difference in the description of the development of the foetus. After all, the entire knowledge with respect to the development of the foetus with respect to the period of gestation is based on a consideration of a large number of cases and then arriving at some generalised conclusion about the development of the foetus corresponding to its age from



the date of conception.

44. Now coming to the case at hand, we find that marriage between the parties was solemnized on 19.04.2012 and the wife joined the Respondent – husband at his matrimonial home the next day i.e., 20.04.2012 and female child is born on 22.01.2013. As such, after calculation we find that the child was born within 278 days of the wife joining the husband at his matrimonial home. Here, it would be pertinent to mention that general gestation period of a child is 280 days. This general gestation period of 280 days has been enshrined in Section 112 of the Evidence Act also. This is also relevant to mention that this 280 days is upper limit of the gestation period and not the lower limit. The child may be born few days prior to 280 days. As such, it goes without saying that the child born within 278 days has been conceived on or after 20.04.2012 when the Appellant-wife joined the Respondent-husband at his matrimonial home after the marriage.

45. Hence, it is conclusively proved that the Respondent has fathered the child. The Appellant was not carrying pregnancy since prior to the marriage.

46. The aforesaid conclusive proof can be



rebutted only by way of proving by the husband that he had no access to the appellant wife.

47. In this context, we find that as per evidence of Respondent-husband, the Appellant-wife joined the Respondent-husband on 20.04.2012 following the marriage on 19.04.2012 and she was taken by her father and brother to their house on 08.06.2012 after the ultrasound pregnancy test. However, as per the Appellant – wife after joining her husband at his matrimonial home on 20.04.2012 she continued to be at her matrimonial home till 12.09.2012 when she was ousted by the Respondent-husband. Even going by the admitted period from 20.04.2012 to 08.06.2012 during which the Appellant – wife stayed with Respondent – husband at his matrimonial home, it is apparent that the Respondent – husband had access to his Appellant – wife when the born child could have been begotten. In such situation, onus is on the husband to show that he had no access. We have already seen that access does not necessarily mean actual cohabitation. It only amounts opportunity of cohabitation. Hence, statement of the Respondent – husband that he has no cohabitation with the Appellant – wife has no meaning in view of the fact that the Appellant – wife stayed with him for 49 days since 20.04.2012



when he had access to his wife. In such situation, he could prove non-access only by way of pleading impotency, serious illness or impossibility of cohabitation with the Appellant – wife. But there is no such pleading or evidence on the part of the husband. In such situation, the Respondent-husband is not permitted to rebut the conclusive proof. No evidence scientific or otherwise can be admissible to dispute the paternity of the child. Even otherwise, pregnancy test by ultrasound is not fully accurate. On the basis of such test one cannot claim on which date the child was precisely conceived. There is always possibility of error of few days.

48. As such we find that the Appellant-wife was not pregnant on the date of marriage. She conceived the child during 20.04.2012 to 08.06.2012 when she was staying with her husband at the matrimonial home and when both had access to each other.

49. Even without application of Section 112 of the Evidence Act, we find that the Respondent-husband has no merit in the case, because the pregnancy test by ultrasound is not fully perfect technique to determine the exact date of conception of the child. That is why the findings in the test is given in the term of week and not in days and even in the term



of week, there is scope of error. If we calculate the period from 20.04.2012 to 08.06.2012 during which both parties were staying together, it would be 49 days i.e. seven weeks, just one week short of eight weeks. There is always scope of such error in the pregnancy test.

50. Moreover, there is no DNA test report of the child and the Respondent-father on record. We find that though during evidence, the Respondent-husband was ready for DNA test but he has never applied to Ld. Family Court for direction of such test, whereas onus was on him to prove that he has not fathered the child, though we are afraid that he could have got such direction without proving non-access to his wife during the period the child could have been conceived. Roving inquiry into the paternity of a child is prohibited in view of Section 112 of the Evidence Act. Our legal framework leans in favour of the legitimacy of a child and frowns upon his/her bastardy. Husband is strongly presumed to be father of the child born to his wife. The presumption could be rebutted only when the husband proves that husband and wife had no access to each other during the period when the child could have been conceived.

51. Hence, even without application of Section



112 of the Evidence Act, we find that the Appellant-wife was not carrying pregnancy prior to the date of marriage.

52. Now coming to the compliance of the condition as provided in Section 12(2)(b)(iii) of the Hindu Marriage Act, the husband is also required to prove that after knowledge of the claimed ground for nullity of the marriage, he had no marital intercourse with the Appellant-wife. Such condition for maintainability of the petition has been complied with by the Respondent-husband, who was petitioner before the Family Court, by pleading and deposition that after the ultrasound test on 08.06.2012, the wife was taken by her father and brother to their house from the matrimonial home.

Point No.2

53. In view of the finding of Point No. 1, the Respondent – husband is not entitled to get his marriage with the Appellant-wife declared void by decree of nullity.

54. In view of the aforesaid findings, we are of considered opinion that the impugned judgment is not sustainable in the eye of law. The impugned judgement dated 18.04.2019, passed by Ld. Principal Judge, Family Court, East Champaran, Motihari in Matrimonial (Divorce) Case No. 250 of 2012 is set aside. Miscellaneous Appeal No. 287 of 2019 is



allowed. However, both the parties shall bear their own costs.

Let the decree be drawn accordingly.

(Jitendra Kumar, J)

(P. B. Bajanthri, J)

Amrendra/-

AFR/NAFR	AFR
CAV DATE	02.08.2023
Uploading Date	15.09.2023

