

Baldev Raj Miglani

Vs

Smt. Urmila Kumari W/O Baldev Raj

Civil Appeal No. 1090 of 1969

(V. D. Tulzapurkar, R. S. Sarkaria JJ)

15.12.1978

JUDGMENT

TULZAPURKAR, J. -

1. The appellant's petition under Section 12 of the Hindu Marriage Act, 1955 for the annulment of his marriage with the respondent on the ground that at the date of the marriage (October 8, 1962) the respondent was already pregnant by some other man, of which he was ignorant then, was decreed by the trial Court on August 26, 1963 but on appeal the decree was reversed and his petition was dismissed by a learned single Judge of the Punjab and Haryana High Court on February 20, 1968; a Letters Patent appeal by the appellant was summarily dismissed by the Division Bench of that Court on August 23, 1968. Hence this appeal by special leave.

2. Few admitted facts in the case may be stated : The appellant was married to the respondent on October 8, 1962 at Patiala. After the marriage he cohabited with the respondent on few occasions but on October 30, 1962 he came to know that the respondent was already pregnant. After that revelation he had no cohabitation with her but immediately on the following day i.e. November 2, 1962 he filed the petition praying annulment of his marriage on the aforesaid ground. The respondent contended that she became pregnant from the appellant and that she never had sexual intercourse with any other person. Admittedly, the respondent delivered a male child on May 20, 1963, which according to the appellant, was a full term and mature delivery. The question that arose before the lower courts was whether the respondent at the time of her marriage with the appellant was pregnant by some person other than the appellant or whether the pregnancy, which ultimately resulted in the delivery of a male child on May 20, 1963, was a result of marital relations between the parties between October 8, 1962 (the date of marriage) and October 30, 1962 (when the respondent's pregnancy got revealed for the first time). Besides the oral evidence furnished by the parties themselves, medical evidence of experts was also furnished on either side. On an appreciation of the evidence that was led before it the trial Court came to the conclusion that the respondent at the time of her marriage with the appellant was pregnant by some other than the appellant, that the appellant at the time of the marriage was ignorant of that fact and that since the discovery by the appellant of the existence of such pregnancy of the respondent the appellant had no sexual intercourse with her and, therefore, the appellant was entitled to a decree of nullity of the marriage. In appeal preferred by the respondent, the learned single Judge of the High Court took the view that the child delivered by the respondent on May 20, 1963 had not been conclusively established by the appellant to be an illegitimate one and, therefore, he allowed the appeal. The question before us in this appeal is whether the appellant could be said to have discharged the burden that lay upon him to prove that the respondent was at the date of the marriage pregnant by some person other than himself. After going through the entire material on record we are clearly of

the view that the appellant has satisfactorily discharged the burden which lay upon him and the trial Court's decree deserves to be restored.

3. In order to appreciate the evidence on record two crucial dates must be kept in mind, namely, October 8, 1962, being the date of the marriage between the parties and May, 20, 1963, the date on which the respondent delivered a son. It was nobody's case that the appellant had access to the respondent before the date of the marriage and even according to the respondent's case the sexual relations between the two commenced on October 9, 1962 and did not last beyond October 30, 1962. In other words, according to the respondent, the pregnancy if it was as a result of sexual relations with the appellant could commence not earlier than October 9, 1962. The question is whether the case of the respondent is true or the appellant's case that the respondent was pregnant since before the date of marriage is true ?

4. On the aforesaid question, in our view, the evidence of some of the doctors examined in the case is very material. Dr. Daljit Dhillon (AW 1) Woman Assistant Surgeon, Hendley Female Dispensary, Sanauri Gate, Patiala, had examined the respondent on October 30, 1962 and after examining had issued a certificate as Ex. A-1. (Incidentally it may be stated that it was as the result of examination of respondent by this witness that the appellant discovered the fact about the respondent's pregnancy.) According to her on October 30, 1962 the respondent's pregnancy was of 2.5 months and in the certificate Ex. A-1 she further stated that "the uterus was two fingers above the symphysis pubis per abdomen". According to her evidence, therefore, the pregnancy in the case of the respondent had started between August 11 and 16, 1962. It appears that she again examined the respondent on December 8, 1962 and issued another certificate (Ex. R1) where she stated that the pregnancy was 16 weeks advanced. This evidence was accepted by the trial Court but rejected by the High Court and, in our view, on flimsy grounds. The High Court rejected the evidence of this witness on the ground that she had admitted in her evidence that she had not specialised in gynaecology. In our view this reason was not sufficient to reject her testimony. In the first place, in the certificate Ex. A-1 the finding has been noted that "the uterus was two fingers above symphysis pubis per abdomen" as a result whereof 2.5 month's pregnancy was determined by her; secondly, the witness may not have specialised in gynaecology which after all is that branch of medical science which treats of the functions and diseases peculiar to women but her knowledge of midwifery as an obstetrician was proved to be of the high order in the case itself, for, in her cross-examination done on April 4, 1963, she clearly stated that respondent's delivery might take place in May 1963 which fact ultimately turned out to be true for the respondent did deliver on May 20, 1963. There is one more aspect of her evidence which requires to be noted. If the respondent's version were true that conception had commenced subsequent to the wedding then by October 30, 1962 her pregnancy at the highest would have been of 21 or 22 days and it is well-known that it is not possible to positively confirm such pregnancy except by performing some special biological tests and admittedly in the instant case it was without performing any special biological test this doctor had confirmed positively respondent's pregnancy. This aspect also lends corroboration to her evidence that respondent's pregnancy must have been in advanced stage such as 2.5 months as deposed to by her. Having regard to these aspects, therefore, it seems to us clear that the High Court was in error in rejecting the testimony of this witness. The evidence of this witness clearly established the fact that the respondent was pregnant since long before the date of the wedding and if that be so, on admitted facts, it must be the result of sexual relations not with the appellant but with some person other than the appellant.

5. Apart from the evidence of Dr. Daljit Dhillon, Dr. (Mrs.) S. Ganda Singh (AW 2), Assistant Professor Obstetrics and Gynaecology, Government Medical College, Patiala, had medically

examined the respondent on March 6, 1963 and she found that on that day the size of the uterus of the respondent was 34 weeks and according to her also the respondent's pregnancy might have started round about second week of July, 1962. It appears that the respondent was got medically examined on January 4, 1963 by Dr. Surinder Kaur (AW 4) under the orders of the Court and according to her evidence the duration of the pregnancy of the respondent was on that day about 16 to 18 weeks which means that the pregnancy must have started latest on September 14, 1962. Lastly, there was evidence of the respondent's own witness Dr. Mrs. P. Kanta, who actually attended the delivery of the respondent on May 20, 1963. This witness clearly admitted that it was a case of nearly full term delivery. She described the condition of the child at the time of the birth in the following terms :

When the child was born he was blue in colour and he did not cry for 4 and 5 minutes. After that the child cried and became pink in colour. There was good crop of hair over his head. The child was covered with vernix caseosa. The lanigo was not present except on shoulders. The nails of the fingers were just beyond the tip of the fingers, nails of the toes were behind the tip of the toes. Both testicles were descended.

The trial Judge noted that Dr. R. W. Johnstone in his textbook on Midwifery at page 132 has stated that the aforesaid signs (Mentioned by Dr. P. Kanta) are the signs of full term and mature delivery and relying upon the evidence of Dr. P. Kanta supported as it was by expert opinion of Dr. Johnstone, came to the conclusion that the child that was born to the respondent on May 20, 1963 was a case of full term delivery and, therefore, it could not be the child of the appellant.

6. It is surprising that the aforesaid evidence was brushed aside by the High Court by relying upon certain passages occurring in Dr. Johnstone's treatise as also in Modi's Medical Jurisprudence dealing with exceptional or freak cases. For instance, the High Court referred to the following passage in Dr. Johnstone's textbook on Midwifery at page 90 :

Fully developed children have been recovered as being after gestation as short as 240 days and as long as 313, 320 and even 331 days from the commencement of the last period.

The High Court also referred to a case mentioned in Modi's Medical Jurisprudence and Toxicology (15th ed.) at page 323 where "a woman aged 30 years gave birth to a girl after gestation of 210 days - ten times three weeks - which was her normal inter-menstrual period. The child cried lustily at birth, had good crop of hair, was well coated with vernix caseosa, measured twenty inches in length, and weighed seven pounds. The finger and toenails were fully developed and the child sucked vigorously on being put to breast". The High Court felt that the respondent's child answered almost all the description mentioned by Modi in the aforesaid case and further observed that it would not be correct to presume from the physical appearance of the child at the time of the birth that it was born 280 days after gestation. It is obvious that the case in point referred to in Modi's book is an exceptional case and not a normal case, but what is more the High Court has failed to notice that in the instance mentioned by Modi in his book the menstrual cycle of the woman concerned was a three-week cycle, whereas in the instant case, according to the respondent's evidence, her's was a four-week menstrual cycle. In our view, therefore, the High Court was clearly in error in relying upon passages occurring in textbooks of medical experts dealing with exceptional cases and rejecting the positive and clear evidence that was led by the appellant in regard to the pregnancy of the respondent and the delivery which took place on May 20, 1963. In face of the positive and clear

evidence that was led by the appellant in the case we are of the view that the High Court's findings were based on conjectures and surmises and the trial Court was right in coming to the conclusion that the appellant had satisfactorily discharged the burden which lay upon him.

7. In the result the appeal succeeds, the decree passed by the learned single Judge of the High Court as confirmed by the Division Bench, is set aside and that passed by the trial Court is restored. The appellant's marriage with that respondent is declared to be a nullity. In the circumstances there will be no order as to costs.

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