TRAVENCORE COCHIN HIGH COURT

Ponnammal

Vs

Andi Aiyan

A.S. No. 370 of 1950

(Koshi, C.J., and M.S. Menon, J.)

22.04.1953

JUDGMENT

M.S. Menon, J.

1. This is an appeal from the decision of the learned Second Judge of Nagercoil denying maintenance to plaintiffs 1 and 2 in O.S.No.162 of 1122. That decision is based on the findings :

1. that the marriage which admittedly took place between plaintiff 1 and defendant 1 on 16-11-1118 was void because of the pregnancy of plaintiff 1 at the time of the marriage; and

2. that plaintiff 2, the daughter that was born as the result of that pregnancy, on or immediately after 15-7-1119 was not the child of defendant 1.

2. According to the lower Court the interval between the marriage and the delivery was too short for defendant 1 to be the father of plaintiff 2 and that forms the main foundation of the two findings mentioned above

3. An attempt was made by defendant 1 to insinuate a pre-marital connection between plaintiff 1 and one Krishnamoorthi. The evidence on record provides no warrant for the suggestion and we need only state, and in the interest of the fair name of plaintiff 1, quite categorically, that the attempt has failed. It is very significant that the letters of defendant 1 to P.W.5, his father-in-law - Exs.A to E, covering the period from 25-11-1118 to 3-3-1119 are not the letters of an indignant victim of a serious conspiracy as a result of which he was married to a pregnant woman but of a demanding son-in-law, conscious of his customary rights and anxious to obtain the maximum in money, perquisites and presents from the father of his bride.

4. If the date of the marriage is taken as the date of conception plaintiff 2 was born over 8 months

thereafter and there can be no doubt that she could very well be the child of defendant 1. The following passages from Taylor's Principles and Practice of Medical Jurisprudence, Vol.2, Edn.10, are instructive :

> (a) "Children born at the seventh month of gestation are capable of living, although they are more delicate, and in general require greater care and attention to preserve them, than children born at the ninth month". (page 34).
> (b) "Hence it is established that children born at the seventh, or even at or about the sixth month, may be reared." (page 36)
> (c) "It would be in the highest degree unjust to impute illegitimacy to offspring, or a want of chastity to parents merely from the fact of a six-months child being born living and surviving its birth." (page 36).

5. The last of the passages cited above was quoted with approval in - '*Clark v. Clark*'[1], a remarkable case in which a child born after a foetal life of 174 days survived her birth and was alive some three years later, at the time the judgment was pronounced.

6. Defendant 1 has a case that he was incapacitated from having any sexual connection at the time of his marriage on 16-11-1118 as he had got himself circumcised a week before that date. The only evidence other than that of defendant 1 as D.W.6 regarding the circumcision is that of D.W.1, the son of the surgeon who is alleged to have performed the operation. D.W.1 at the time of the operation was a student in the IV Form and about 15 years of age. He admits his friendship with defendant 1 and that he had no summons to appear in Court on the date he was examined. Even if we are prepared to accept his evidence, which we are not, and find that the defendant was incapacitated from having sexual intercourse with his wife for about 30 days from the date of the operation which according to D.W.5 is the interval necessary between a circumcision and sexual intercourse - the time available, over seven months, is sufficient to justify the inference that defendant 1 was the father of plaintiff 2 and to leave unrebutted the presumption in that behalf under Section 112, Indian Evidence Act, 1872.

7. The lower Court has followed a statement of Raghavachariar in his Hindu Law (Edn. 3, page 62) to the effect that the marriage of a girl who is pregnant by intercourse with a stranger is invalid. In the view we have taken it is unnecessary for us to discuss the correctness or otherwise of that statement.

8. The learned counsel for the appellants has stated that we may proceed on the basis that Ex.F, a partition deed dated 5-7-1122, and Ex.G, a mortgage dated 6-7-1122, are valid and that his clients are satisfied with a decree charged on the share of defendant 1 under Ex.F and subject to the mortgage under Ex.G. This eliminates completely the contentions regarding those documents raised in the Court below.

9. For the reasons stated above we hold that plaintiff 1's marriage with defendant 1 was valid, that plaintiff 2 is the issue of that marriage and that plaintiffs 1 and 2 are entitled to maintenance. Taking the financial position of defendant 1 into consideration we think that a fair award will be at the rate of Rs.10/- per month to the mother and Rs.5/- per month to the daughter. The arrears claimed in the plaint will also be calculated at the rates mentioned above. The amount payable as maintenance will be a charge on the properties set apart to the share of defendant 1 under Ex.F and subject to Ex.G as mentioned in the last preceding paragraph.

10. We allow the appeal, with costs, on the lines indicated above.
Appeal allowed.

Cases Referred.

[1](1939) 2 All ER 59