Bombay High Court
Uttamrao Rajaram And Ors. vs Sitaram Rajaram And Ors. on 16 July, 1962
Equivalent citations: AIR 1963 Bom 165, (1962) 64 BOMLR 752, ILR 1963 Bom 77
Bench: D Patel, V Wagle
JUDGMENT

1. This is a Letters Patent appeal IN against the decision of Badkas, J., whereby he decreed the plaintiffs' suit. The short facts are that one- Rajaram of village Andhrud died on 20th February, 1929. At his death, he left defendant No. 1 Uttamrao as the only child. Plaintiff No. 1 Sitaram alleged that he was a posthumous son of Rajaram through his wife Saijai having been born on 23rd December, 1929, i.e., 308 days after Rajaram's death. Plaintiff No. 2 is an alienee of some property. Uttamrao, the son of Rajaram, is defendant No. 1 and Atari and Madhaorao, defendants Nos. 2 and 3, are his sons. Defendant No. 4 Saijai is the mother of plaintiff No. 1 and defendant No. 5 Salubai is the mother-in-law of Uttamrao. Since the death of Rajaram, all the properties stood in the names of Uttamrao and the plaintiff Sitaram. The suit out of which the appeal arises was filed in 1950 for partition and possession. The contesting defendants raised a number of pleas. They pleaded that Saijai was not the lawfully wedded wife of the deceased Rajaram. According to their case, the was the wife of one Bapurao and was kept by Rajaram as a concubine in a separate residence after the death of his second wife. As Rajaram was harassed before his death by her first husband, he sent Saijai to her village Gaikhed, and since about a year and a half before the death of Rajaram, she was living at Gaikhed away from Rajaram. She came to Andhrad after Raja-Tarn's death to attend on the 13th day of the death and on that day she was not pregnant. She conceived subsequently and came to Andhrud to avert infamy'. They also contended that Raja-ram was in a decrepit state, old and therefore incapable of procreation. In short, they challenged the legitimacy of the plaintiff No. 1

2. The trial Judge found that the plaintiff No. 1' s mother was the lawfully married wife of the deceased Rajaram and negatived the defendant's contention that she was living separate from Rajaram at his death. He found that Rajaram died of some disease, call it eczema or anything. We says:

> "He may have died of leprosy or diabetes;
>
> whatever the vernacular word Mihya may suggest, one thing is certain that he died of a d

He therefore held that ho was incapable of procreation when he died. He relied upon an alleged admission by Saijai that she delivered an illegitimate child five or six years after Rajarara'a death calculated 366 days of gestation and held against the plaintiff No. 1 on the question of legitimacy. The plaintiff's appeal to the District Court failed.

3. The District Court confirmed the first finding of marriage, held that Rajaram was capable of procreation till his death, calculated 366 days of gestation and relying upon post-unchastity, confirmed the finding of illegitimacy against the plaintiff No. 1.

4. Badkas, J., was of the view that the lower Courts had not applied correct principles and that they had erred in calculating 366 days of gestation and in taking into consideration post unchastity long time after Rajaram's death. He therefore did not accept the finding.

5. Mr. Phadke on behalf of the appellants has urged (i) that the learned Judge erred in applying the decisions of English law; (ii) that in any case he erred in relying upon the principles enunciated in cases not in legitimacy suits but in divorce proceedings, (iii) that in any case those cases occurred during wedlock and ought not to apply to the present case, (iv) that the learned Judge erred in not relying on post-unchastity of Saijai and (v) that the learned Judge was not entitled in second appeal to interfere with a finding of fact.

6. In respect of the first point, the learned Advocate invited our attention to Section 112 of the Evidence Act and argued that in India we are governed by a codified law of evidence and therefore the principles enunciated in the English, law cannot be applied. Section 112 provides for raising a conclusive presumption of legitimacy if the child is born either during the continuance of marriage or within 280 days after its dissolution unless non-access is established. This does not necessarily mean that if the child is born beyond a period of 280 days, it must be presumed that the child is illegitimate. Undoubtedly, if the plaintiff comes to Court, the initial burden is on him. But then one cannot overlook Section 114 of the Evidence Act, which says that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in relation to the facts of the particular case. If the child is born within a reasonably possible period at the normal period of gestation, then the Court should raise a presumption of legitimacy, and then the burden would shift, since "great care must be taken, regard being had to this, that the- evidence is to be received under a law, which respects and protects legitimacy and does not admit any alteration of the status et condition of any person, except upon the most clear and eat is factory evidence." Per Eldon L. C., in James Head v. Mary Head, (1823) Turn and R 138 at p. 141 : 37 ER 1049.

It cannot be gainsaid that the question of legitimacy is of grave importance as it is a matter of social status and affects the whole future of a person. Lord Oaksey, while considering the quantum of proof which is beyond reasonable doubt, says in Preston Jones v. Preston Jones, 1951-1 All ER 124 at p. 133:

"The onus in such a case as the present, however, is founded, not solely on such considerations, 'but on the interest of the child and the interest of the State in matters of legitimacy since the decision involves not only the wife's chastity and status but in effect the legitimacy of her child: see Russell v. Russell, 1924 AC 687."

7. The reason of the principles is of universal application and Section 112 of the Evidence Act does not affect it. Of course, when evidence for and against is led the question of burden of proof loses importance since the Court must decide the question on the evidence.

8. As to the second and third contentions, it is no doubt true that the learned Judge relied upon the principle enunciated in divorce cases and that these cases occurred during lawful wedlock. It

appears to us however that in principle it should not make any difference. In 1951-1 All ER 124 at p. 127 Lord Simonds, while considering the question, says:

"The result of a finding of adultery in such a case as this is in effect to bastardise the child. That is a matter in which from time out of mind strict proof has been required."

9. In this connection, we may refer with advantage to Gaskill v. Gaskill, 1921 P 425 in a divorce proceeding where Viscount Birkenhead, L.C., after extensively citing passages from the judgment in Morris v. Davies, (1837) 5 C and F 163 at p. 215, a case in legitimacy suit, said at page 434:

"It is true that the observations were made in reference to a legitimacy suit, but I cannot conceive that in the present case any different principle can apply; otherwise it might happen that the mother would be condemned for adultery on evidence which would not disentitle the child to be declared to be the legitimate issue of her husband."

As the question of adultery and legitimacy are closely interlocked, one completely dependent upon the other, the quantum of proof must be the same in each case and the evidence must show that the child is not a legitimate child beyond any reasonable doubt.

10. Lord Simonds in 1951-1 All ER 124 says at page 127:

"That does not mean, however, that a degree of proof is demanded such as in a scientific inquiry would justify the conclusion that such and such an event is impossible. In this context at least no higher proof of a fact is demanded than that it is established beyond all reasonable doubt: see (1823) Turn and Rule 138. To prove that a period of so many days between fruitful coition and the' time of conception is in a scientific sense impossible is itself, I suppose, a scientific impossibility.

The utmost that a Court of law can demand i that it should be established beyond all reasonable doubt that a child conceived so many days after a particular coitus cannot be the result of that coitus."

11. Viscount Birkenhead, L.C., in 1921 P 425 cited the following observations of Lord Lyn-dhurst, L.C., in (1837) 5 Cl and F 163 which he-took from the Banbury Peerage Case (Le Mar-chant's Gardner's case App 437-439):

"That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is-countered by such evidence as proves to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child."

And he observed:

"Lord Lyndhurst goes on to point out that all that the case of (1823) 1 S and Section 150 decided was the Court must be satisfied that sexual intercourse did not take place 'not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt, in the minds of the Court or jury to whom that question is submitted'."

In the ease before him. (Viscount Birkenhead) the only evidence of adultery was admittedly the abnormal length of pregnancy. No other fact or circumstance was adduced which in any degree-cast any reflection upon the chastity or modesty of the wife who on oath denied adultery. He says:

"I can only find her guilty if I come to the conclusion that it is impossible having regard to-the present state of medical knowledge and belief, that the petitioner can be the father of the child. The expert evidence renders it manifest that there is no such impossibility".

It is clear on authorities that the evidence must, exclude all reasonable doubt,

12. While considering this question, we cannot disregard cases where the Courts refused to declare against the legitimacy of the child where the period that elapsed between the last coitus and the birth of the child was more than the normal period in the case of P. v. P., 12 Ind Cas 946 (Lah) the period was 330 or 333 days. Evidence was led to show what can be the maximum period in such cases of prolonged gestation. In Wood v. Wood, 1947-2 All ELR 95 the period was of 346 days. In Hadlum v. Hadlum, 1949 P 197 the period was 349 days. In 1921 P 425 the period was 331 days. On the other hand, in M.T v. M.T, 1949 P 331 the child born after 340 days was held to be illegitimate; and in 1951-1 All ER 124 the child born after 360 days was held to be evidence of adulterous intercourse. In that case, after referring to 1921 P. 425, 1947-2 All ER 95 and 1949-P. 197 Lord Simonds says :

"I must, I think, however reluctantly, come to the conclusion that an additional period of eleven days, making three hundred and sixty days in all, 'ought not to be regarded as making the vital difference so that the court can without any further evidence regard adulterous intercourse as proved beyond all reasonable doubt'", (the underlining (here into ' ') is ours).

On the medical evidence before the Court he and" the other learned Lords came to the conclusion that the question must be answered in favour of adultery. So also in 1949 P-331 the evidence of the condition of the child at birth and the medical evidence influenced the conclusion. The underlined (herein ' ') portion in the above citation is however clear enough, to show I that something more than mere delay in delivery is required to negative legitimacy.

13. In the present case, therefore, unless there was anything either in the medical or other evidence led before the Court, the mere fact that 306 days had elapsed after the death of Rajaram would not be sufficient to hold that the plaintiff No. 1 was an illegitimate son. The evidence was vague and is wholly insufficient to negative the plaintiff's legitimacy.

14. The next contention is that the post-unchastity of the wife cannot be disregarded, and reliance is placed on Mt. Rahirn Bibi v. Chirag Din, AIR 1930 Lah 97, Tikam Singh v. Dhan Kunwar, ILR 24 All

445; Fatteh Din v. Umrao, AIR 1923 All 440, and Tikan-gauda Mallangauda v. Shivappa Patil, ILR 1943 Bom 706 : (AIR 1944 Bom 40). In AIR 1930 Lah 97 the child was born 419 days after the husband s death. The learned Judge first referred to the case of 12 Ind Case 946 (Lah) and said that a period of 330 or 333 days after cohabitation was noted as suspicious and that with each succeeding day beyond that period, the improbability would naturally increase. It may incidentally be mentioned that the trial Court and the District Court have not appreciated the importance of the words "beyond that period" which means beyond 330 or 333 days. In that case however the learned Judge does not appear to have relied upon subsequent immorality. In ILR 24 All 445 the child was born 357 days after the death of the alleged father. There were several circumstances negativing the legitimacy of the child, one of them considered by the Court being "grave charges of immorality made against the mother and not refuted by her or by any of the parties implicated". There is no clear finding as to the time of her misconduct, but the allegation was that she had mis-conducted herself with no less than four persons who were in her service from time to time (probably during the lifetime of her husband). These allegations were not denied. The immorality of the wife was very near and about the time of the birth of the child. In AIR 1923 All 440 illicit connection with another person was shown previous to the birth of the child. In ILR (1943) Bom 706 : (AIR 1944 Bom 40) the child was born 970 days after the death of the husband and the criminal intimacy alleged against the mother of the child was a year after the birth of the child. It may in some cases be not improper to consider the v unchastity of the mother as one of the factors p which would determine the issue.

15. We are of the view, however, that this unchastity must be very near about the time when the child could have been conceived and was born.' It would be impossible to hold that merely because a woman had, for some time 10 years before the birth of the child or 10 years after the birth of the child, some immoral connection, the child is illegitimate. Merely because a person has mis-conducted once, there cannot be a presumption that the misconduct must continue. Much less can there be a, retroactive presumption. Unless the Court definitely finds unchastity in the mother immediately about the time the child is born or could have been begotten, it would not be a relevant circumstance. The learned Judge was justified in disregarding it from consideration.

16. It is argued that the learned Judge had-no jurisdiction to disregard the finding of legitimacy which itself was a question of fact. He relied upon Meenakshi Mills Ltd. v. I. T.. Commr. (S) and Paras Natlv Thakur v. Mohani Dasi . It is true that merely because the determination of fact depends upon inferences to be drawn from findings of other facts, it does not become a question of law. It is also true that a finding of fact, however erroneous it may be, is binding on the High Court in second appeal. Yet, a finding of fact may be open to review if it is contrary to law or if there is any error or defect in the procedure, i.e. it must satisfy all the external conditions of a legal finding. We may illustrate the application of this requirement by referring to a few cases without giving an exhaustive list. A finding given though there is no evidence Anangamanjari Chowdhrani v. Tripura Soondari 14 Ind App rot at p. no (PC), Hemanta Kumari Bebi v. Brojen-dra Kishore 17 Ind App 65 at p. 69 (PC), where a case is disposed of on a point not raised by the parties and to which evidence was not directed Shivabasava v. Sangappa, 31 Ind App 154 (PC), a finding based on misconception of what the evidence is Govind v. Vithal ILR 20 Bom 753, where the court misdirects itself on a point of law in arriving at a finding of fact Midnapur Zamindary Co. v. Uma Charan 29 Cal W. N. 131 : (AIR 1923 PC 187) where the court has not applied its mind Subedar v. Jagat Narain ILR 46 All 773 : (AIR 1924

All 848), the finding cannot be binding. Similarly, when a finding is arrived at on a conside ration -of irrelevant, documents or matters which affects the conclusion of the Court, the finding cannot be binding.

17. It seems to us that the learned Judge-was justified in taking the view that the learned Additional District Judge's judgment was contrary to law inasmuch as the Additional District Judge had taken irrelevant matters into, consideration which he ought not to have and wrongly applied the decisions in ILR 24 All 445 and AIR 1930 Lah 97. We may also add that' neither the Additional District Judge nor the-

-trial Judge were aware of the rule that it must 'be proved beyond reasonable doubt that the plaintiff was illegitimate. (Rest of the judgment is not material for reporting.)