Madras High Court
Subbarama Reddiar vs Saraswathi Ammal on 16 March, 1966
Equivalent citations: (1966) 2 MLJ 263
Author: O M. Anantanarayanan
JUDGMENT M. Anantanarayanan, O.C.J.

1. This Letters Patent Appeal has been instituted by one Subbarama Reddiar, the respondent before Venkatadri, J., in C.M.S. No. 9 of 1964, from the judgment and decree of the learned Judge. We may very briefly state that the proceeding before the learned Judge was of the nature of a Second Appeal, in respect of a petition under Section 10(f) and Section 13 of the Hindu, Marriage Act (XXV of 1955), for a decree for judicial separation originally before the learned Principal Subordinate Judge of Chingleput.

2. The learned Principal Subordinate Judge of Chingleput went into the facts of the evidence before him, elaborately on the merits, and held that the act of adultery alleged by the husband (appellant) against his wife Saraswathi Ammal (Respondent) on the occasion in question, was legally proved, and hence that the husband was-entitled to a decree for judicial separation Under Section 10(f) of the Hindu Marriage Act. The matter went up on appeal to the learned District Judge of Chingleput (C.M.A. No. 64 of 1962), and the learned District Judge of Chingleput confirmed the judgment of the Court below in first appeal, in a judgment of some length, which again proceeds to an analysis of the evidence. There can be no doubt that the appeal against this order before the learned Judge (Venkatadri, J.) was of the nature of a Second Appeal. That was held by Kailasam, J. in Sathappa Chettiar v. Ammaponnu (1966) 1 M.L.J. 102 and if we may say so with respect we have no doubt whatever that Kailasam, J., is correct in his view. Though the proceeding before him was thus of the nature of Second Appeal and the jurisdiction of the learned Judge Venkatadri, J., was indisputably restricted by virtue of Section 100, Civil Procedure Code, the learned Juage neverthless has differed from both the Courts below and allowed the Second Appeal after the citation of certain English decisions and a further analysis of the facts of evidence both with regard to the probabilities arising on that evidence and the credibility of the witnesses.

3. Two main questions therefore arise before us for our determination. It isr strenously contended by learned Counsel for the appellant (Sri V. Thyagarajan) that in view of the explicit and categorical decisions of the Supreme Court and of this Court to which we shall presently refer the learned Judge (Venkatadri, J.) had really no jurisdiction to proceed into questions of fact to reassess the evidence and to come to any different conclusion. If that is the situation at law the learned Counsel for the respondent is unable to contend that there is any authority for holding that the situation is different because the question of fact is the question of an act of adultery which has sometimes been characterised as a fact of quasi-criminal character and therefore requiring a high degree of proof. The second question is apart from this question of the ambit of interference in Second Appeal whether there is any error of law or misapplication of the principles of law in the judgments of the Courts below, in their conclusion that the act of adultery was proved against the wife, which might conceivably justify interference with the decree by this Court in Second Appeal. If both these questions are to be answered in favour of the appellant, it would inevitably follow that we must allow this appeal and reverse the decision of Venkatadri, J.

4. As regards the first proposition, the matter is really not in doubt, and must be regarded as set at rest by numerous decisions of the Supreme Court and of this Court of which it is sufficient to refer to the following:

5. In Muthia Asari v. Madasami Asari (1965) 2 M.L.J. 220 a Bench of this Court, of which One of us was a party, had occasion to discuss the same principle, and it was laid down that the High Court, in exercise of its jurisdiction with regard to Second Appeals, will have no power to interfere with an explicit finding of fact based on the appreciation, of evidence even if the High Court be of the view that the finding is erroneous. Another decision precisely to the same effect is Motimul Sowcar v. Visalakshi Amtnal which was also a Bench decision to which one of us was a party. The principle has been stated in a slightly different from in this decision, that, except for the clearest and strongest of reasons, which could be held to tantamount to interference on a question of law, the High Court in Second Appeal will have no jurisdiction to convert itself into a Court of first appeal, and to reverse a concurrent finding of fact.

6. These statements of the law are based upon authoritative decisions of the' Supreme Court, such as the decision in Sinha Ramanuja v. Rahga Ramanuja Delivering the judgment of the Court Subba Rao, J., observed that the High Court had no jurisdiction to entertain a Second Appeal on the ground of an erroneous finding of fact, however gross the error may be. It will be noticed that their Lordships have enunciated the inhibiting principle, in even stronger terms than have been used in the two decision of this Court that have been referred to.

7. In Pattabhiramaswamy v. Hanymayya A.I.R. 1959 S.C 57 the same bar of jurisdiction has been laid down, referring to the provisions of Section 100, Civil Procedure Code and to the dicta of the Judicial Committee in the very early case Durga Chowdhrani v. Jawahir Singh L.R. 17 I.A. 122 P.C. Therefore, unless the reversing judgment of the learned Judge can be sustained as a judgment based upon the discovery of some error of law, or misapplication of law to facts, of a fundamental character, in the judgments of the Courts below, the reversal cannot be legally sustained. We do not think that this is really in doubt. What was argued before us, on the contrary, was that the perspective of approach of the lower Courts to the entire question was so erroneous that it can be maintained that the interference by this Court in Second Appeal was justified, upon a ground of law.

8. Before proceeding into this aspect, which necessarily involves a discussion of the facts of evidence, and the scope of the record we may refer to the several decisions discussed by the learned Judge (Venkataari, J.) in his judgment, as laying down the true principles of law applicable to proof of the factum of adultery, where this is alleged by one spouse against another as a matrimonial offence. In Varadarajulu Naidu v. Baby Ammal (1964) 2 M.L.J. 187 Venkatadri, J., himself held that, in divorce cases on the ground of adultery, Courts can act even upon uncorroborated testimony and grant relief, taking the surrounding circumstances into consideration. In that juagment as in the present judgment, the learned Judge referred to the dicta of Sir William, Scott in Lovedon v. Lovedon (1810) 2 Hag. Rep. 1. He also referred to the observation of Coleridge, J., in Riches v. Riches 35 T.L.R. 141 and the dicta of Denning, L.J., in Miller v. Minister of Pensions (1947) 2 All E.R. 372. In the judgment under appeal, the learned Judge referred to certain other decisions and they include Rose v. Rose 10. L.R. (1930) A.C. 1 Gower v. Gower (1950) 1 All E.R. 804 Preston Jones

v. Preston Jones (1951) 1 All E.R. 124 and the decisions of the Supreme Court in Earnest John White v. Kathaleen Olive White 1958 S.C.J. 839 : (1958) 2 M.L.J.

(S.C.) 125 : (1958) 2 An. W.R. (S.C.) 125 : 1958 M.L.J. (Crl.) 631 As far as the decision of the Supreme Court in concerned, that we may immediately deal with. We might observe that that was a proceeding under Section 56 of the Indian Divorce Act (IV of 1869), and it related to the interpretation of Sections 7 and 14 of the Divorce Act; the dictum stemming from the English precedents was here given recognition that, with regard to the matrimonial offence of adultery, when alleged by one spouse against another as a ground for divorce or other relief, the Court must be satisfied beyond reasonable doubt that adultery was committed. It will be noted that, though the principle has been set forth in differing forms in various decisions, very little can be added to the early statement of Sir William Scott in Lovedon v. Lovedon (1810) 2 Hag. Rep. 1 " that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion ", namely, proof of the fact. At the same time, certain refinements have also to be taken note of. It has been recognised in a catena of decisions that do not require separate analysis here, since the matter is beyond doubt, that adultery can very rarely, if ever, be proved by the direct evidence of witnesses who saw the parties in flagrante delicto and witnessed the act. In most cases, the evidence must be circumstantial in character and must depend upon the situation spoken to in regard to which the act in alleged, and the probabilities relating to that situation. But they (the circumstances) must satisfy the test that, regarded together, they lead to an irresistable inference that adultery must have been committed. Another refinement is that noted by Denning L.J., in Miller v. Minister of Pensions (1947) 2 All E.R. 372 that proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The quasi-criminal character of the jurisdiction, that has sometimes been referred to, is not of particular importance, except that we have to note that there must be a high degree of proof which would make the guilt of the erring spouse certain to the mind of the Court judging evidence of the offence. But once these propositions are conceded, the rest must clearly depend on the facts of each individual case. As in the practice of the Courts in England, here also adultery can only be regarded as a question of fact depending on the cumulative view of the evidence; if there were a jury trial, it would be a question of fact to be put to the jury by the addressing Judge, after enunciating the relevant legal principles. Venkatadri, J., had himself laid down that there is no rule of law that the fact cannot be proved upon the uncorroborated testimony of one witness. This is of very little significance here for, in the present case, we certainly have corroboration and we have considerable evidence about the situation in which the act of adultery is said to have occurred.

9. Before proceeding to a conspectus of the evidence, we desire to and one more observation. The cases in England are very useful in this regard, as our Courts have affirmed to principles laid down in several English decisions, stemming from the 19th century. Moreover, our own Act does follow, in a large measure, the provisions of the English Act. But apart from proceeding to the English decisions for light upon the basic principles, we are afraid that these cannot be and should not be utilised to any further degree or extent. This is for the compelling reasons that social conditions, and the unwritten ethics of social conduct, in the two countries, may be so widely different. The behaviour between the sexes, in particular and the norms that apply to such behaviour, will differ markedly from culture to culture and nation to nation. A degree of familiarity that may be totally

innocent in one country, or permitted by custom, may be so condemned by social taboos in another, that the occurrence of such incidents of familiarity will be compatible only with an inference of infidelity. In other words, there is no sphere in which it is more unsafe to draw generalisations from the facts of judicial precedents in quite different countries such as India and England, than the sphere of social relationships and morals as impinging on the law of marriage and divorce.

10. Having said all this, we may now proceed to a very brief conspectus of the evidence in the case. As we stated earlier, there is quite a volume of testimony about the particular incident upon which the husband relied for proof of adultery-According to him, there was a ceremony (karumadi) at Chekamjeri village that evening and he proceeded there at 6 P.M. and came back to his house at midnight, or sometime thereafter. We have been referred to discrepancies in the times furnished by various witnesses, but in our view, they are eminently natural to testimonies of persons in rural areas, and of little consequence. The husband (P.W. 1) came and found an old lady Sayamma (P.W. 2) in front of his house, outside. When he pushed the door and went into the bedroom, he saw his wife, the respondent and one Ramanathan " lying one over the other ". He raised cries of distress and alarm, and caught hold of tne intruder Ramanathan. Hearing the shouts, Sayammal (P.W. 2) came there, and also raised cries and caught hold of the husband the petitioner probably being afraid that he would stab the other man. In this disturbance, Ramanathan succeeded in escaping. Naturally enough, there was considerable shouting and altercation and a crowd very soon gathered, including two witnesses who seem quite disinterested, namely, Mohana Ranga Naidu (P.W. 3) and Bodi Naidu (P.W. 4). It is important to note that, according to the witnesses the wife (respondent) gave no answer whatever to questions about what had happened, and how the incident had occurred. The parents of the wife were then sent for, and P.W. 1 was weeping at the spot. His parents also came, and after a little talk the girl was taken away. That was the last time when P.W. 1 was with his wife, and there was no subsequent reunion or condonation, before the proceeding for judicial separation.

11. P.W. 1 is corroborated by Sayammal (P.W. 2) Mohana Ranga Naidu (P.W. 3) and Bodi Naidu (P.W.4). Indisputably even P.W. 2 does not state that she saw Ramanathan and the respondent lying one over the other; that part of the evidence of P.W. 1 is uncorroborated. But she states that she heard the cries, and went in and saw the husband (Petitioner) and Ramanathan engaged in a scuffle. She caught hold of the husband and Ramanathan escaped. The evidence of P.W. 3 is along the same lines, though he came a little later. The evidence of P.W. 4 is important, for that contains some res gestea evidence about what the husband (petitioner) saia, which is significant. According to P.W.4, P.W.I told him that he returned late at night and saw Ramanathan in the house and caught hold of him, and then P.W. 2 came and caught hold of P.W. 1, when Ramanathan escaped. We do not think that we would be justified in proceeding into a discussion of the several opposing grounds of probability and improbability that were apparently canvassed before the learned Judge (Venkatadri, J.) arising from this evidence, and which have also been canvassed before us. We think it is sufficient to record our conclusion that, as far as the merits are concerned the trial Court and the first appellate Court went carefully into this evidence, considered the counter-testimonies of the wife (respondent) and her parents, and accepted the evidence of P.Ws. 1 to 4 as the truth. In our view, these findings are undoubtedly binding on this Court in Second Appeal and this Court has no jurisdiction to reassess the evidence, and come to any other conclusion, even if a learned Judge of

this Court thinks that the evidence ought to be appreciated differently or that some part of the testimony ought not to be believed. The question whether any principle of law can be said to arise in Second Appeal, can only be argued on the basis of facts as established by the record, and as accepted by the trial Court and the first appellate Court.

12. Regarded in this light, there are only two arguments that would appear to merit further discussion at our hands. The first is an argument put forward by the learned Counsel for the respondent, but not referred to by the learned Judge. It is that the conclusion of the trial Court, and even the conclusion of the first appellate Court are not couched in such explicit terms as to lead to an inference that those Courts thought that the fact of adultery had been established beyond reasonable doubt. In particular, reference is made to one observation of the trial Court, that the evidence about adulterous intercourse was very flimsy, and depended entirely on the interested testimony of P.W. 1 and the corroborative testimony of P.W. 2 etc. We do not think that we would be justified in taking a stray observation from the judgment of the trial Court, and basing any power of interference upon that as involving a principle of law. The judgments of the two Courts are clear and explicit that on the evidence, they found the fact of adultery proved to their satisfaction beyond reasonable doubt. Nor can it be doubted that, if the evidence is to be accepted in its details, it would induce any reasonable person to come to only one conclusion, that the respondent had adulterous intercourse with Ramanathan, on the occasion in question.

13. The other ground of law is that referred to by the learned Judge--the learned Judge has indicated that certain authorities may be the sources for such a view. The learned Judge points out that the evidence of the petitioner did not show that Ramanathan was naked, when the petitioner saw him, or in a state of partial undress. Nor did the petitioner state that the wife (respondent) had exposed her body, or that he found her with her body exposed. The learned Judge then adds:

The evidence of the husband that he saw Ramanathan lying over his wife would not show that she made a surrender of her body, her mind and everything.

It is argued that this is a question of law, since adulterous intercourse has to be proved as a fact and a mere attempt at sexual intercourse will not amount to an act of adultery.

14. With great respect to the learned Judge we are unable to follow him in the observation that we have extracted and set forth above. Indisputably, adultery will have to be described, if not defined, as involving a voluntary act of sexual intercourse between the erring spouse and some other person. We have no doubt that where the wife is merely the victim of rape, or the intercourse takes place when she was stupefied by a drug, this would not amount to adultery. But the logical fallacy, if we may say so, in the perspective of approach discussed by the learned Judge is that while the law requires that adultery should be proved beyond reasonable doubt, it equally recognises that this cannot be by direct evidence in most cases but must be by circumstantial evidence. If we follow the learned Judge rightly, he appears to think that actual penetration should be proved for proof of adultery. This can only be by direct evidence, and it would mean that unless the erring spouse and the third party were caught in the actual act in flagrante delicto proof of adultery would be impossible. That is not the law, and we have no reason to think that it is, since numerous decisions

have recognised that proof of adultery by direct evidence cannot be expected, in most cases. The point is, what is the inference to be drawn from the evidence in the record, if we accept that evidence at face value ? We think that, only one inference is possible and that only one inference can be drawn, by any reasonable person, namely, that the respondent and Ramanathan did commit the act of adultery together on that occasion. It is in this context that we must emphasise that the unwritten taboos and rules of social morality in this country and particularly in village areas must necessarily be taken into account. If an unrelated person is found alone with a young wife after midnight, in her bedroom, in an actual physical juxtaposition unless there is some explanation forthcoming for this which is compatible with an innocent interpretation, the only interpretation that a Court of law can draw must be that the two were committing an act of adultery together. We do not think that this need be dilated upon further. In any view, it is not a question of law, it is a question of fact, which would be left to the jury in any proceeding for divorce in the United Kingdom. Even if the learned Judge (Venkatadri, J.), was unable to agree, he really had no jurisdiction to reverse the finding in a Second Appeal.

15. In the light of the above analysis, we allow the Letters Patent Appeal, set aside the decree of Venkatadri, J. and restore the decree for judicial separation, granted by the trial Court. We also direct, Under Section 25 of the Hindu Marriage Act (XXV of 1955), that the husband do pay the wife alimony of Rs. 35 per mensem awarded by the Courts originally till such time as she becomes-disentitled to it by any second marriage. The parties will bear their own costs.