

Smt. Dukhtar Jahan

Vs

Mohammed Farooq

Criminal Appeal No. 13 of 1981

(A. P. Sen, S. Natarajan JJ)

20.01.1987

JUDGMENT

NATARAJAN, J. -

1. This is an unfortunate case where the High Court has quashed an order of maintenance passed in favour of a minor child Tarana Farooq by the Special Judicial Magistrate No. 1, Rampur under Section 125 CrPC, in exercise of its powers under Section 482 CrPC. The High Court has, however, deemed it fit to grant a certiorari to the appellant Dukhtar Jahan, the mother of the minor child, under Article 134(1)(c) read with Article 134-A of the Constitution to prefer an appeal to this Court for consideration of a question of law formulated as under :

Whether, in an application under Section 482 CrPC the High Court can interfere with concurrent findings rendered by the courts below.

2. As we find the appeal is capable of being disposed of on the basis of other materials, we do not feel called upon to answer the question of law formulated for consideration by the High Court.

3. We may now have a look at the facts of the case. The appellant Dukhtar Jahan and the respondent Mohammed Farooq who were already related as first cousins, being the issues of two sisters, were married on May, 11, 1973. The marriage lasted only for about 17 months since the respondent divorced the appellant on October 16, 1974. However, when the parties were in wedlock the appellant delivered a female child named Tarana Farooq on December 5, 1973. After the respondent effected the divorce in October 1974, the appellant filed a petition under Section 125 CrPC in the Court of the Special Judicial Magistrate No. 1, Rampur for grant of maintenance to her and the child at Rs. 150 p.m. and Rs. 50 p.m. respectively. The appellant however gave up the claim of maintenance for herself as the stand of the respondent was that he had paid her the mahr and the amount payable for the audit period and that he had also returned all the articles given by way of dowry. The enquiry in the petition was therefore, confined to the claim of maintenance for the child Tarana.

4. The respondent refuted his liability to provide maintenance to the child on the ground that he was not the father of the child and that the child had been conceived even before marriage and the appellant had suppressed the fact of her being enceinte at the time of the marriage.

5. While the appellant examined herself and another witness to substantiate the claim for maintenance for the child, the respondent examined three witnesses besides himself to refute the claim. Of those three witnesses, two have spoken about the payment of mahr etc. to the appellant

and hence we need mention only about the testimony of DW 2 Abdul Asad. This witness was a Panchayat Sevak and he has deposed that he made entries in the birth register (EX. Kha-1) about the birth of the girl child Tarana Farooq to the respondent and the appellant on the basis of information given to him by the Village Chowkidar by name Kalicharan. Obviously this witness has been examined to show that the respondent was not the informant of the birth of the child in order to neutralise the effect of the entry in the birth register.

6. The trial magistrate, after taking into consideration the evidence adduced in the case and the conduct of the parties held that since the child had been born when the parents were in wedlock and since the respondent had not discarded the wife or disowned the child forth with but had waited for about 10 months to divorce the appellant, it would be reasonable to hold that the child should have been conceived to the respondent and as such he is by law obligated to provide maintenance to the child. After taking into consideration the respondent's income the learned magistrate awarded maintenance to the child at Rs. 30 p.m. as against the claim of Rs. 50 p.m.

7. A revision preferred against the order of the magistrate to the Sessions Judge, Rampur proved of no avail and hence the respondent filed Criminal Misc. Petition No. 1816 of 1978 to the Allahabad High Court under Section 482 CrPC for quashing the order of maintenance. A Single Judge of the High Court has allowed the petition and quashed the order of maintenance in favour of the child. The learned Judge has taken the view that since the child had been born in about 7 months time from the date of marriage and since the child was not claimed to be prematurely born it has to be necessarily held that the appellant should have conceived even before she married the respondent and consequently the respondent cannot be held to be the father of the child and called upon to pay maintenance to it.

8. As the order of the High Court appeared to be prima facie unsustainable and as the respondent failed to enter appearance in spite of notice being served on him, we requested Mr. Bobde to appear as amicus curiae for the respondent, and we are thankful to him for his assistance.

9. The admitted facts are that the appellant and the respondent were close relations and not strangers before marriage. They were married on May 11, 1973 and the girl child was born on December 5, 1973. The respondent did not divorce the appellant immediately after the childbirth or even two or three months later but he divorced her only on October 16, 1974. The childbirth took place in the house of the respondent himself and hence there is no question of the birth of the child not being known to the respondent immediately.

10. In spite of all these factors the High Court has allowed itself to be influenced by only two factors viz. the childbirth taking place in about 7 months' time from the the date marriage and the child being claimed to be a full-grown one at the time of birth.

11. Examining the matter, we feel the learned Judge has failed to view the case in its entire conspectus and this has led to miscarriage of justice. On the sole ground that the child had been born in about 7 months' time after the marriage it cannot be concluded that the child should have been conceived even before the respondent had consummated the marriage. Giving birth to a viable child after 28 weeks' duration of pregnancy is not biologically an improbable or impossible event. In "Combined Textbook of Obstertrics and Gynaecology" by Sir Guglad Baird 7th edn. at page 162 it is reported as under :

In the case of Clerk v. Clerk, (1939) P 228 an extremely small baby, born alive 174

days after last possible date when intercourse with the husband could have taken place, and which survived, was held to be legitimate. While it is most unusual for babies of this weight or gestation period to survive it does occasionally happen.

The learned Judge ought not, therefore, to have rushed to the conclusion that a child born in about 7 months' time after the marriage of the parents should have necessarily been conceived even before the marriage took place. Insofar as the second aspect is concerned viz. about the appellant's statement that the child was not born prematurely, the High Court has failed to bear in mind that the appellant is a rustic and illiterate woman and as such her opinion could suffer from error of judgment.

12. 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.

13. To drive home the point, we may refer to some of the reported cases where the courts have applied the rule of evidence contained in Section 112 of the Indian Evidence Act and declared the legitimacy of a child born during wedlock, even though the child had been born prematurely. In *Mahbub Ali v. Taj Khan* (AIR 1951 Lah 77(2) : 26 IC 969 : PWR 1915), it was held that a boy born about 7 months' after his father and mother were lawfully married and who had opportunity of access to each other at the time he could have been begotten, must be held to be the legitimate son of his parents. In *Khan Singh v. Natha Singh* (AIR 1925 Lah 414 : 7 LLJ 184 : 26 PLR 509 : 90 IC 123) the defendant's father was married to the defendant's mother on August 2, 1889 and the defendant was born on January 23, 1890. Even so it was held that the defendant being born during the continuance of the marriage between his parents, he is his father's legitimate son unless it is shown that his parents had no access to each other at any time when he could have been begotten and that it is immaterial how soon after the marriage the defendant was born. In *Sibt Mohammed v. Md. Hameed* (AIR 1926 All 589 : 24 ALJ 723 : 96 IC 582), it was held that a Muhammedan child born during the continuance of a valid marriage between its parents but within 6 months of the date of its parents' marriage must be held to be a legitimate child by reason of Section 112 of the Evidence Act. In *Ponnammal v. Andi Aiyar* (AIR 1953 Tra-Co. 434 : 40 CN 169) the paternity of a child born to a married woman after 8 months from the date of marriage was disputed as the husband alleged that he was incapacitated from having sexual intercourse for one month from date of marriage due to some operation he had to undergo and hence the child was not his. The court held that even assuming that the husband was so incapacitated, the time available, viz., over seven months, was sufficient to raise the presumption that he was the father of the child.

14. Even without reference to Section 112 of the Indian Evidence Act if we take into consideration the facts of the case and the conduct of the parties and the attendant circumstances we find a preponderance of materials to support the case of the appellant rather than that of the respondent.

15. The relevant features which have escaped the attention of the High Court can be catalogued as under :

15-A. If the appellant was pregnant even at the time of the marriage she could not have concealed that fact for long and in any event the respondent would have come to know of it within two or three months of the marriage and thereupon he would have immediately protested and either discarded the appellant or reported the matter to the village elders and relatives and sought for a divorce. On the contrary the respondent had continued to lead life with the appellant in a normal manner till the birth of the child. Even the confinement appears to have taken place in his house as otherwise the child's birth would not have been registered in his village. The respondent had not disowned the child immediately after its birth or sent away the appellant to her parents' house. Such would not have been his conduct if he had any doubt about the paternity of the child. Moreover, there is an entry in the birth register (Ex. Kha-1) setting out the respondent as the father of the child. Though the respondent has attempted to neutralise the entry in Ex. Kha-1 by examining DW 2 and making it appear that the entry had been made on the basis of information given by a third party, the lower courts have refused to give credence to the vague and uncorroborated testimony of DW 2. It is also significant to note that the respondent had allowed eleven months to pass before effecting a divorce. By his inaction for such a long period the respondent has given room for inference that the divorce may have been effected for other reasons and not on account of the appellant giving birth to a child conceived through someone else. Lastly, even if the child had been born after full-term pregnancy it has to be borne in mind that the possibility of the respondent having had access to the appellant before marriage cannot be ruled out because they were closely related and would therefore have been moving in close terms. All these factors negate the plea of the respondent that the minor child was not fathered by him.

16. The proper course for the High Court, even if entitled to interfere with the concurrent findings of the courts below in exercise of its powers under Section 482 CrPC, should have been to sustain the order of maintenance and direct the respondent to seek an appropriate declaration in the civil court, after a full-fledged trial, that the child was not born to him and as such he is not legally liable to maintain it. Proceedings under Section 125 CrPC, it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner. The High Court was, therefore, clearly in error in quashing the order of maintenance, in favour of the child.

17. The appeal has, therefore, to succeed and we accordingly allow the appeal and set aside the order of the High Court and restore the order of maintenance passed by the trial court.

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