Dukhtar Jahan vs Mohammed Farooq on 20 January, 1987

Equivalent citations: 1987 AIR 1049, 1987 SCR (1)1086, AIR 1987 SUPREME COURT 1049, 1987 (1) SCC 624, 1987 (1) IJR (SC) 328, 1987 UP CRIR 116, 1987 CRIAPPR(SC) 124, 1987 APLJ(CRI) 220, 1987 ALL WC 627, 1987 BBCJ 36, 1987 ALLAPPCAS (CRI) 128, 1987 SCC(CRI) 237, 1987 IJR 52, 1987 2 APLJ (CRI) 28, 1987 JT 221, (1987) SC CR R 113, (1987) 1 CRIMES 245, (1987) MARRILJ 153, (1987) 2 DMC 225, (1987) EASTCRIC 243, (1987) 1 HINDULR 362, (1987) MATLR 106, (1987) 1 RECCRIR 375, (1987) 2 SCJ 683, (1987) SIM LC 191, (1987) 2 CRILC 362, (1987) 1 SUPREME 135, (1987) ALLCRIR 314, (1987) ALLCRIC 82, (1987) 2 APLJ 28, (1987) CHANDCRIC 63, (1987) 2 ALLCRILR 259, (1987) 1 ALLCRILR 334, (1987) 1 CURLJ(CCR) 622

Author: A.P. Sen

Bench: A.P. Sen

PETITIONER:
DUKHTAR JAHAN

Vs.

RESPONDENT:
MOHAMMED FAROOQ

DATE OF JUDGMENT20/01/1987

BENCH:
NATRAJAN, S. (J)
BENCH:
NATRAJAN, S. (J)
SEN, A.P. (J)

CITATION:
1987 AIR 1049 1987 SCR (1)1086
1987 SCC (1) 624 JT 1987 (1) 221
1987 SCALE (1)92

ACT:
A Code of Criminal Procedure, 1973, section 125, nature of proceedings under.
B. High Court's jurisdiction under section 482 of the Code of Criminal Procedure--Whether could interfere with the concurrent findings of the courts below granting maintenance to the child/wife.
C. Evidence Act, section 112--Rule of law under section

112 as to the legitimacy or otherwise of the child--Whether the factors that the child was born within seven months' time from the date of the marriage and that the illiterate mother had deposed the child was not born prematurely lead to the inference of suppression of the factum of the mother being enceinte at the time of marriage.

HEADNOTE:

The appellant and the respondent, who were already related as lint cousins being the issues of two sisters, were married on 11.5.1973. The marriage lasted only for 17 months, since the respondent divorced the appellant on 16.10.1974. When the parties were in wedlock, the appellant delivered a female child on 5.12.1973. After the Respondent effected the divorce in October, 1974, the appellant tiled a Petition under section 125 Criminal Procedure Code in the Court of the Special Judicial Magistrate No. 1, Ramput for grant of maintenance of Rs.50 p.m. to the child.

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.

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 forthwith 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

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respondent and as such he is by law obligated to provide maintenance to the child. He accordingly awarded maintenance to the child Rs.30 p.m. as against the claim of Rs. 50 p.m.

A Revision Petition 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 High Court of Calcutta under section 482 Cr. P.C. for quashing the order of maintenance. A Single Judge of the High Court allowed the petition and quashed the order of maintenance in favour of the child, by taking 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. However the High Court granted a certificate under Article 134 (1)(c) read with Article I34A

of the Constitution to the appellant to prefer an appeal for consideration of a question of law formulated as "Whether, in an application under Section 482 Cr. P.C. the High Court can interfere with concurrent findings rendered by the courts below. ' '

Allowing the appeal, the Court,

HELD 1.1 Proceedings under section 125 of the Code of Criminal Procedure 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. In the instant case, the order of the High Court of Calcutta quashing the order of maintenance in favour of the child by setting aside the concurrent findings rendered by the Courts below is not in order. [1094E-F]

1.2 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 Cr. P.C., 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 maintainit. [1094D-E]

1 .3 The facts of the case and the conduct of the parties and the attendant circumstances reveal a preponderance of materials to support the case of the appellant rather than that of the respondent. [1093E]

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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 (Exhibit Kha-I) setting out the respondent as the father of the child. Though the respondent has attempted to neutralise the entry in Exhibit Kha--I by examining D.W.2 and making it appear that the entry had been made on the basis of the information given by a third party, the lower courts have refused to give credence to the vague and uncorrobarated testimony of D.W.2. Further, 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 alter a 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 on close terms. AH these factors negate the plea of the respondent that the minor child was not lathered by him. Giving birth to a viable child after 28 weeks' duration of pregnancy, according to medical science is not biologically an improbable or impossible event. [1093F-H; 1094A-D]

2. Section 112 of the Indian Evidence Act 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

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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. [1092D-F]

Mahbub Ali v. Taj Khan, AIR 1915 Lahore 77(2); Kahan Singh v. Natha Singh, AIR 1925 Lahore 414; Sibt Mohamed v. Md. Maneed, AIR 1926 Allahabad 589 and Ponnamal v. Addi Aivan, AIR 1953 TRACO 434 (Vol. 40, C.N. 169), approved.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 13 of 1981 From the Judgment and Order dated 26.3.1979 of the Allahabad High Court in Crl. Misc. Petition No. 1816 of 1976 Altar Ahmad for the Appellant (not present). V.A. Bobde (Amicus Curiae) for the Respondent. The Judgment of the Court was delivered by NATARAJAN, J. 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 Cr.P.C., in exercise of its powers under Section 482 Cr. P.C. The High Court has, however, deemed it fit to grant a certificate to the appellant Dukhtar Jahan, the mother of the minor child, under Article 134(1)(c) read with Article 134A of the Con- stitution to prefer an appeal to this Court for considera- tion of a question of law formulated as under:--

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

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.

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 11.5.1973. The marriage lasted only for about 17 months since the respondent divorced the appellant on 16.10.1974. However, when the parties were in wedlock the appellant delivered a female child named Tarana Farooq on 5.12.1973. After the respondent effected the divorce in October 1974, the appellant filed a petition under Section 125 Cr.P.C. 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 Maher and the amount payable for the Iddat 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.

The respondent refuted his liability to provide mainte- nance 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. 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 Maher etc. to the appellant and hence we need mention only about the testimony of D.W.2 Abdul Asad. This witness was a Panchayat Sevak and he has deposed that he made entries in the birth register (Exhibit Kha-I) 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.

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 forthwith 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 obli- gated 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 per month as against the claim of Rs.50 p.m. 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 High Court of Calcutta under Section 482 Cr.P.C. 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 neces- sarily 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.

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 re- quested Mr. Bobde to appear as amicus curiae for the re- spondent, and we are thankful to him for his assistance. The admitted facts are that the appellant and the re- spondent were close relations and not strangers before marriage. They were married on 11.5.1973 and the girl child was born on 5.12.1973. The respondent did not divorce the appellant immediately after the child birth or even two or three months later but he divorced her only on 16.10. 1974. The child birth 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. In spite of all these factors the High Court has allowed itself to be influenced by only two factors viz. the child birth taking place in about 7 months' time from the date of marriage and the child being claimed to be a full-grown one at the time of birth.

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 Obstetrics and Gynaecology" by Sir Gugald Baird 7th Edition at page 162 it is reported as under:-

> "In the case of Clark v. Clark (1939) 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 for gestation period to survive it does occasion- ally 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. In so far as the second aspect is concerned viz. about the appel- lant'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.

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 hun- dred 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 begotton. 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 legitima- tion 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.

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,, A.I.R. 1915 Lahore 77 (2) it was held that a boy born about 7 months' after his father and mother were lawfully married and who had opportunity or access to each other at the time he could have been begotten, must be held to be the legitimate son of his parents. In Kahan Singh v. Natha Singh, A.I.R. 1925 Lahore 414 the defendant's father was married to the defendant's mother on 2nd August 1889 and the defendant was born on 23rd January 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 Mohammad v. Md. Hameed, A.I.R. 1926 Allahabad 589 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. Addi Aiyan, A.I.R. 1953 TRA-CO 434 [Vol. 40, C.N. 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. 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 cir- cumstances we find a preponderance of materials to support the case of the appellant rather than that of the respond- ent.

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

> 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 con- finement appears to have taken place in his house as other- wise the child's birth would not have been registered in his village. The respondent had not disowned the child immedi- ately 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 (Exhibit Kha-1) setting out the respond- ent as the father of the child. Though

the respondent has attempted to neutralise the entry in Exhibit Kha-1 by exam- ining D.W.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 D.W.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 some one else. Lastly, even if the child had been born after a full-term pregnancy it has to be born 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 lathered by him. 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 Cr.P.C., 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 Cr.P.C., 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.

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.

S.R. Appeal allowed.