

Amina Vs. Hassan Koye

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Court : Kerala

Decided On : May-31-1985

Reported in : 1985CriLJ1996

Judge : V. Bhaskaran Nambiar and; Varghese Kalliath, JJ.

Appellant : Amina

Respondent : Hassan Koye

Judgement :

Varghese Kalliath, J.

1. Our learned brother, Bhat, J. doubted the correctness of the decision reported in Abdul Rahimankutty v. Aysha Beevi : AIR1960 Ker101 . He referred the matter for the decision of a Division Bench. Accordingly these cases come up before us.

2. An interesting and to some extent hitherto not very well indagated question in Muhammadan Law arises in these cases. Whether the marriage of a Muhammadan male with a muhammadan female pregnant through some unknown person is valid, void or irregular? A subsidiary question that has to be answered is whether the Muslims of Malabar area or for that matter any part of the State are presumed to follow Hanafi Law or Shafie Law.

3. To make the case intelligible it is desirable to call attention to the brief facts. These are the facts. Cri. R.P. No. 278 of 1981 is by a wife in a proceeding under Section 125 of the Cri. P.C. She was married to the respondent and she gave birth to a child. The respondent divorced the petitioner. He neglected to maintain her and the child. The petitioner claimed maintenance for herself and for her child from the respondent.

4. The respondent contended that there was no real marriage except a semblance of marriage. The petitioner was pregnant by whoredom, at the time of marriage and the child born on 28-4-1973 within four months after marriage is not his child. He also contended that at any rate, he is not liable to pay the excessive amount claimed by the petitioner as maintenance from him.

5. The trial Court evaluated the evidence adduced before the Court and held that the petitioner was pregnant when she contracted the marriage with the respondent. Nevertheless, the trial Court awarded maintenance at the rate of Rs. 757- per month to the petitioner. No amount was awarded as maintenance for the child, obviously for the reason that the respondent was found to be, not the father of the child. The respondent challenged the order before the District Court, Kozhikode. The petitioner also filed a revision against the order refusing to award maintenance to the child and against the quantum of maintenance allowance fixed. The learned District Judge heard both the revision petitions together and passed a common order. He held that the marriage between the petitioner and the respondent is invalid and so the petitioner is not entitled to any maintenance. The learned District Judge also held that in view of the proved fact that the respondent is not the father of the child thereby clearly indicating that the respondent is responsible for the illegitimate pregnancy of the petitioner, the revision petition challenging the refusal to award maintenance to the child has no merit. The petitioner now challenges the order of the District Judge by these proceedings - Cri. R.P. No. 278/81 and Cri. M.C. 518 of 1981.

6. Section 125(1) of the Cri. P.C runs thus:

125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain -

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation - For the purposes of this chapter:

(a) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained his majority;

(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

7. The 'eternal landscape of the past' unfolds itself to say that seventy seven years ago, a law was legislated in India Section 488 Cri P.C. what is now to be called a social legislation to balk and deflect indolence and vagrancy by constraining on those who had an ethological accountability under the natural law the law based upon the moral feelings of mankind instinctively felt to be right and fair to support a

cast off wife or a derelict child, whether legitimate or illegitimate, to pay monthly allowances for the sustenance of the forlorn wife and neglected child. Certainly, the prime devoir and obligation in this regard, no welfare state can afford to slacken and so this social legislation (now Section 125 CrI. P.C.) always deserves to be administered carefully in this country, when the conscience of the Constitution of the country tells us that the brooding omnipresence of the paramount law is the spirit of social justice.

8. Section 125 of the Code confers a statutory right of maintenance from her husband on 'every wife' who includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. The content of Section 125 informs us that it is a piece of beneficial and social legislation which should receive liberal construction of its beneficial provision in the context of the rapid social mobility of our society. We are of the view that the conflict in the home and neglect of the young and helpless women should be viewed as matters of community concern and not as private brawls or tragedies to be left in the courts to the fortuitous justice of the ordinary adversary procedure. Certainly in this area the judicial process is avowedly beginning to look for a solution of the situation on a societal basis rather than a judgment for or against one or another of the persons involved.

9. Before advertent to consider the content and scope of Section 125 of the new Code, it would be of relevance to consider the legal position as it obtained prior to the enactment of the new CrI. P.C. of 1973. Section 488 of the old Code inter alia provided that if a person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, that person is under an obligation to make a monthly allowance for the maintenance of his wife and/or the child. The right thus conferred was confined to the wife and a legitimate or illegitimate child to claim maintenance. The social purpose of the provisions of Section 488 was obviously a benignant purpose aimed at preventing vagrancy or at least preventing its consequences. Certainly it was not considered as a penal provision punishing a husband or parent for his neglect but to compel those who can and those who have a social and moral obligation to support those who are unable to support themselves. The provisions of Section 125 are also certainly

intended to achieve the same object in a greater and larger measure. In a recent decision (Mohammed Ahammed Khan v. Shah Bano Begum) : 1985 CriLJ875 , Supreme Court has observed thus:

The liability imposed by Section 125... is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion.

10. Section 488 restricted its operation to wives and children who are legitimate or illegitimate. Section 125 casts its net wider. It has an enlarged circle of operation. It brings into its fold the parents who are unable to maintain themselves and also a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried, and who are unable to maintain themselves. It is settled law as far as Section 488 is concerned that a claim for maintenance by a wife against her husband is entertained only when it was proved that the complainant is the wife of the defendant. Normally only a legally married woman was entitled to maintenance. True, the standard of proof to establish a valid marriage in the case of persons who were living for a number of years as husband and wife was not at all stern and strict. Nevertheless proof of marriage in case of dispute was an essential desideratum to gain an order of maintenance. Precedents would inform us that under Section 488 only a deserted and an abandoned wife and not an abandoned mistress, however faithful she may have been to her paramour, and however badly she may have been treated by him, is not entitled to maintenance. The status, as a wife was the condition sine qua non for availing the ameliorative provision of Section 488, Cr. P.C.

11. Certainly the legislature had no intention that 'illegitimate wives' just as in the case of children who are legitimate or illegitimate should be entitled to maintenance. When the Legislature wanted to provide for maintenance to children, it has been made specific that children who are legitimate or illegitimate are entitled to maintenance. In this context we may refer to the observations of the Supreme Court in Commr. of Sales Tax U.P. v. Parson Tools & Plants : [1975]3SCR743 :

If the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a causes omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation by analogy or implication something what it thinks to be a general principle of justice and equity. 'To do so' would be entrenching upon the preserves of Legislature, the primary function of a court of law being *jusdicere* and not *jus dare*.

In the 1973 Code also Section 125 provides for maintenance for the wife including a woman who has been divorced by, or has obtained a divorce from her husband. A divorce presupposes a marriage.

12. The meaning of the word 'wife' given in the Concise Oxford Dictionary is 'married woman especially in relation to her husband' and 'husband' means 'a man joined to a woman by marriage. If the marriage is null and void and invalid in law, the woman would never be considered as a wife and the man a husband. A long cohabitation as husband and wife as stated earlier, is not sufficient to make the woman a 'wife' or the man a 'husband'. Otherwise a concubine or any woman living with the paramour and treating herself to be his wife could claim to be his wife for the purposes of Section 125. A woman cannot claim maintenance unless she proves that she is either the wife or the divorced wife of the defendant against whom she claims maintenance. So the question which is crucial in this case is, whether there was a valid marriage between the petitioner and the respondent. If the marriage is not valid, the petitioner would never become the wife of the respondent and that in such a case she can never claim to be a woman who has been divorced by or has obtained a divorce from her husband because they were not at any time husband and wife. The respondent submits that there was no marriage at all under the Muhammadan Law or under any other law and so, the petitioner has not become at any time the wife of the respondent and hence not a divorced woman by her husband. The question posed calls us to consider the content and nature of marriage under Muhammadan Law.

13. 'Marriage (hikah) among Muslims is a 'solemn pact' (mithaq-e-ghalid) between a man and a woman, soliciting each other's life companionship, which in law takes the form of a contract (aqd).' vide Dr. Tahir Mahmood's Muslim Law of India. We feel that we are not wrong if we say that there is an unfounded popular belief that no religious significance or social solemnity attaches to a Muslim marriage and it is merely a civil contract pure and simple. We say so because as early as in 1866 Mahmood, J. in the leading case, Abdul Kadir v. Salima (1886) ILR 8 All 149 (FB) said : 'marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnised generally with recitation of certain verses from the Kuran, yet the Muhammadan law does not positively prescribe any service peculiar to the occasion.' The judgment was delivered by (Petheram, C.J. But it is noted in the judgment itself that by the time, the judgment was to be delivered, Mr. Justice Mahmood left the court and the written opinion of Justice Mahmood was adopted by the Full Bench, consisting of five Judges Petheram, C.J., Old field, Straight, Brodhurst, and Tyrrell, JJ.). In the report it may appear that Mahmood, J. was not one among the five judges. What is quoted by us from that judgment itself is a quotation adopted by the learned Judge, from the Tagore Law Lectures (1873).

14. We may at once quote what Sir Shah Muhammad Sulaiman C.J. observed in Anis Begam v. Muhammad Istafa (1933) ILR 55 All 743 : AIR 1933 All 634. He said : 'It may not be out of place to mention here that Maulavi Samiullah collected some authorities showing that a marriage is not regarded as a mere civil contract, but as a religious sacrament.' Fyzee in his book 'Outlines of Muhammadan Law' said 'considered juristically, marriage in Islam is a contract and not a sacrament'. The statement is generally overstressed, to render the real nature of marriage obscured and to forget and ignore the other important aspects of marriage.

15. A learned commentator and exponent of Muslim Law Tyabji in his book 'Muslim Law' observes that marriage brings about a relation based on and arising from a permanent contract for intercourse and procreation of children between a man and a woman, who are referred to as parties to the marriage and who after being married, become husband and wife. Neil B.E. Baillie in the book 'Digest of Moohummudan Law' tells us that 'marriage is a contract which has for its design or

object the right of enjoyment, and the procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man'. Hedaya on the Mussulman Laws informs us that nikah in its primitive sense means carnal conjunction. Some have said that it signifies conjunction generally. In the language of the law it implies a particular contract used for the purpose of legalizing generation. Marriage is contracted, that is to say, is effected and legally confirmed, by means of declaration and consent, both expressed in the preterite, because although the use of the preterite be to relate that which is past, yet it has been adopted in the law, in a creative sense, to answer the necessity of the case. Sir Roland Knyvet Wilson in his book 'Anglo-Muhammadan Law' says that marriage is a contract for the purpose of legalising sexual intercourse and the procreation of children. It involves the rights and duties between the married persons themselves, and between each of them and the children born from the marriage. Sacred Koran teaches:

'O men, fear your Lord, who hath created you out of one man, and out of him hath created his wife, and from them two hath multiplied many men and women' Sacred Koran chap. iv. 8.

'The Holy Prophet said : Men marry women for their piety, or their property, or their beauty : but ye should marry for piety.' Trimizi, Jami, 1.331.

16. We shall try to decoct the content of the above statements of the exponents and commentators and the views of the eminent judges as to the nature of the Muslim marriage. We propose to consider the concept of marriage under three broad headings, namely, legal, social and religious. Juristically, it may be a contract as opposed to a sacrament. But it cannot be considered as a contract pure and simple to be governed exclusively by the provisions of the Contract Act. Rules to be applied for interpreting a muslim marriage are not exclusively confined and cabined within the four walls of the general statutes - Contract Act and allied Acts. It is always to be understood and interpreted in the light of the personal laws of the parties and the ethic content and ethos of the institution of marriage, as popularly understood by the Muslims in the country,

17. As stated by Dr. Tahir Mahmood, it is a solemn pact between a man and a woman, though it takes the form of a contract. It has to be remembered that Holy Prophet did describe nikah (marriage) as his sunnat and every Muslim knows the sacred socio-religious significance of sunnat as recognised by the Muslim religion. We feel certain that Sacred Koran does not treat marriage as an ordinary contract, on the basis of what Holy Prophet has said on the subject. Even if we consider that a muslim marriage is a contract, it certainly requires free consent of the parties as in the case of an ordinary contract. Since consent of parties is the core element of a contract, juristically as well as in the concept of Muhammadan Law, we have to consider the question of consent in detail in this case. We defer the consideration relating to consent now and we pass on to consider the other two aspects of the marriage.

Social aspect:

18. The social contents of marriage as admitted by the writers of Islamic Law can be serialised as : (1) Islamic Law gives to the woman a definitely high social status after marriage; (2) restrictions are placed upon the polygamy of pre-Islamic times, and a controlled polygamy under exceptional and extraordinary circumstances is allowed, (3) The Holy Prophet, both by example and precept, encouraged the status of marriage.

19. There is a well-known adage attributed to the Holy Prophet : 'There is no monkery in Islam'. This adage reveals the attitude of Holy Prophet towards celibacy very briefly and adequately.

20. We may now tell one other aspect which, would silhouette profile of a popular misconception attached to Muslim marriage law. The misconception is the belief that the Holy Prophet has given his imprimatur and has recognised polygamy among Muslims. We think that those who battologize and recite verses of the Sacred Koran or cite Holy Prophet for finding licitness and authority for the practice of controlled polygamy restricted to four wives are really offenders of Islamic Law. The great jurist Ameer Ali said:

The conviction is gradually forcing itself on all sides, in all Muslim communities, the polygamy is as much opposed to Islamic laws as it is to the general progress of civilised society and true culture. In consequence of this conviction a large and growing section of Islamists regard the practice of polygamy as positively unlawful.

The supporters of polygamy quote the Holy Koran Chapter IV, Verse 3.

And if you fear that you cannot do justice to orphans, marry such women as seem good 1 to you, two, or three, or four; but if you fear that you will not do justice, then (marry) only one or that which your right hands possess. This is more proper that you may not do justice.

But Chapter IV, Verse 129 runs thus:

Ye are never able to be fair and just as between women, even if it is your ardent desire

It is admitted on all hands that this Chapter was revealed to guide the Muslims under the conditions which followed the battle of Uhud.' (The Holy Quran by Maulana Muhammad Ali). A. Yusuf Ali interpreting the original text of Sacred Koran has said that Holy Prophet has only described the practice of polygamy that was prevalent at that time. Of course Holy Prophet allowed an exception under the peculiar post-war (battle of Uhud) circumstances, where there were too many females and orphans and less males. Holy Prophet himself even in that circumstance realised the agonising difficulty - an impossibility - of treating two or more wives with even justice, care, love and affection enjoined that a Muslim should have only one wife. We feel that Koranic injunction is monogamy and the deviation should be a rare exception. A. Yusuf Ali again says that practice of polygamy is the practice of the 'Times of Ignorance'. Mr. Justice Hidayattullah felt an urgent necessity of the modernisation of the family law of the Muslims including the abolition of polygamy, he said so in his Introduction to Mulla's Principles of Mahomedan Law.

21. Imbued by the spirit of Koranic injunctions several Muslim countries codified their personal law interdicting the practice of polygamy by imposing total

prohibition or severe restrictions. In Pakistan, on the recommendations of the Commission on Marriage and Family Laws, Ordinance No. VIII of 1961 was passed on 15th July, 1961. Section 6 of that Ordinance tells us that in Pakistan, it is not possible to practice polygamy without permission from the Arbitration Council. We quote Section 6.

6. Polygamy.- (1) No man during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permission under Sub-section (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.

(3) On receipt of the application under Sub-section (2), the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such condition if any, as may be deemed fit, the permission applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision, and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, in the case of West Pakistan, to the Collector and, in the case of East Pakistan, to the Sub-Divisional Officer concerned and his decision shall be final and shall not be called in question in any court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall -

(a) pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and

(b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

Some of the countries who have reformed their law on this subject are Syria, Tunisia, Morocco, Pakistan and Iran. We close our discussion on this point by repeating the words fallen from the founding fathers of the Constitution in Article 44 of the Constitution. 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Religious aspect:

22. Marriage is recognised in Islam as the basis of society. The Koranic injunction regarding marriage is that marriage as an institution gives the uplift of man and is a means for the continuance of the human race. Religious significance of marriage is revealed in full when the Holy Prophet compared it with Sacred Sunnat. Spouses are strictly enjoined to honour and love each other. The Holy Prophet asked the people to see their brides before marrying them and taught that nobility of character is the best reason for marrying a woman. It has to be remembered that infibulation and defloration in public was not an uncommon practice to assure premarital chastity.

23. Now, returning to the case, the proved facts tell us that at the time of marriage, the woman was having illicit pregnancy - in the language of Muhammadan Law - the woman was pregnant by whoredom. The question is how the loss of virginity and the fact of five months and nuptial pregnancy would affect the contract of marriage.

24. Tyabji and Fyzee have classified the marriages under Muhammadan Law as : (1) valid, (2) void and (3) irregular. According to Dr. Tahir Mahmood, the classification is as follows : (a) lawful - that is, a marriage which is contracted in compliance with all legal requirements; (b) unlawful - that is, a marriage which, has been solemnized in violation of one or another legal requirement; (c) void - that is, a marriage which, though claimed to have been solemnized, has no legal recognition at all; and (d) irregular - that is, a marriage which is unlawful but not

void.

25. The learned Counsel for the petitioner submits that even on the facts said to have been proved in this case, the marriage has to be treated as not void, but only as a marriage which is irregular and the consequences of a marriage which is irregular will not disentitle the petitioner claiming as the 'wife' under Explanation (b) of Section 125(1) of the Code of Criminal Procedure. He submits that even assuming that at the time of marriage, the petitioner was five months pregnant, the marriage is not void or unlawful but it is only irregular.

26. Fyzee observes that a union between a man and a woman may be either lawful or unlawful. Unlawfulness may be either absolute or relative. If the unlawfulness is absolute, the marriage is void. If it is relative, the marriage is irregular. He has given five classes of marriages which are irregular. They are : (1) a marriage without witnesses; (2) a marriage with a woman undergoing iddat; (3) a marriage prohibited by reason of difference of religion; (4) a marriage with two sisters, or contrary to the rules of unlawful conjunction; and (5) a marriage with a fifth wife. Tyabji has also adopted the same classification. He has classified irregular marriages under Section 82 : Under Hanafi Law a marriage contract entered into (a) without the presence of witnesses or (b) between persons prohibited from intermarrying by unlawful conjunction or iddat or divorce or religion or supervenient illegality is irregular and not void.

27. Definitely the classification as such does not tell us that a marriage with a woman pregnant by whoredom is valid, irregular or void. We shall now quote Section 47(2)(b), Tyabji's Muslim Law : 'A woman pregnant by whoredom may (i) according to Abu Hanifa and Imam Muhammad marry, but must refrain from matrimonial intercourse till delivery : (ii) Abu Yusuf holds such marriage to be illegal'. In Hanafi Law two views hold the field but Shiite Law is more specific and positive. 'Under Shiite Law a pregnant woman cannot lawfully marry'. Anyhow, Abu Yusuf definitely holds the view that a pregnant woman is incapable of contracting a valid marriage.

28. As early as in 1886, Mahmood, J. in the Full Bench decision reported in (1886) ILR 8 All 149 held that 'it is a general rule of interpretation of the Muhammadan

Law that, in cases of difference of opinion among the jurisconsults Imam Abu Hanifa and his two disciples Qazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed; and, in the application of legal principles of temporal matters, the opinion of Qazi Abu Yusuf is entitled to the greatest weight. In Mulla's Principles of Mahomedan Law, the learned author says ; 'It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the disciples prevails'. This opinion is based upon the decisions in Agha Ali Khan v. Altaf Hasan Khan (1892) 14 All 429 (FB) and Abdul Kadir v. Salima(1886) ILR 8 All 149 (FB). The same view has been accepted by Varadachariar and Pandurang Row, JJ. in Kutti Umma v. Nedungadi Bank Ltd. AIR 1937 Mad 731. In Anis Begam v. Muhammad Istafa Wali Khari (1933) ILR 55 All 743 : AIR 1933 All 634 Sulaiman, C.J. said:

It is not a general rule of interpreting the Muhammadan law that whenever there is a difference of opinion between Imam Abu Hanifa and his two disciples the opinion of a majority out of the three will prevail, or that the opinion of Imam Abu Hanifa will prevail over that of the disciples; there is no fixed rule of universal application in such cases.

In Aga Mahomed Jaffer Bindanim v. Koolsom Beebee, (1897) ILR 25 Cal 9 their Lordships of the Privy Council said:

But it would be wrong for the courts on a point of this kind (the right of the widow to inherit) to attempt to put their own construction on the Quran in opposition to the express ruling of commentators of such great antiquity and high authority.

29. Durrul Mukhtar is a high authority of antiquity. It is said there : 'where on such a point there is a difference between Abu Hanifa and his disciples, the opinion of the latter should prevail'. Imam Abu Hanifa and Imam Muhammad were not considered to be as dependable and authoritative as Qazi Abu Yusuf and Mahmood, J. tells us that Abu Hanifa and Imam Muhammad were purely speculative jurisconsults. They formulated legal principles from the traditional sayings of the Holy Prophet. Qazi Abu Yusuf was the Chief Justice of the Empire of Khalifa Harun-ul-Rashid, He had the advantage of applying legal principles to

the actual conditions of human life, and his dicta (especially in temporal matters) command high respect in the interpretation of Muhammadan Law. Tyabji in Section 44 of his book said that as to the marriage of a woman pregnant by illicit intercourse, according to Abu Yusuf her marriage is not void but 'irregular' as she must observe iddat.

He cites Baillie, page 38. We quote Baillie page 38:

Aboo Haneef a and Moohummud have said that it is lawful for a man to marry a woman pregnant by whoredom, though he must refrain from matrimonial intercourse with her till her delivery. Aboo Yusuf, however, was of opinion that the marriage is not valid, but the futwa is in accordance with the opinion of two others. As it is not permitted to have connection with her, so also it is not permitted to solicit her.

30. In dealing with the question who must observe iddat, Section 44 of Tyabji's Muslim Law says that iddat is incumbent on woman after the dissolution of a rightful or a semblable marriage followed by consummation, or the death of the husband. Pregnant women are subject to the prohibitions contained in Section 47. It is difficult for us to accept the submission of the learned Counsel for the petitioner that the validity of the marriage is to be tested on the basis of non-observance of iddat even in the case of a woman who had an anti nuptial pregnancy. This we say because the learned Counsel for the petitioner has submitted that the marriage is to be considered as a marriage with a woman who had violated the observance of iddat. He further says that the prohibition of marriage on account of non-observance of iddat is a temporary prohibition lasting only during the period the iddat lasts. The final submission of the counsel is that the marriage is irregular and not void since it is in the realm of temporary prohibition. We cannot agree.

31. The object of iddat is to ascertain the .state of womb, that is to ascertain whether the woman be pregnant so that re-marriage during pregnancy may be prevented. We quote Hedaya page 32:

A man may marry a woman pregnant by whoredom.- A man may lawfully marry a woman pregnant by whoredom, but he must not cohabit with her until after her delivery. This is the doctrine of Haneefa and Mohammed. Aboo Yousaf says that a marriage made under such a circumstance is invalid : if, however, the descent of the foetus be known and established, the marriage is null, according to all doctors. The argument upon which Aboo Yoosuf supports his opinion as above, is, that the illegality of the marriage, in cases where the parentage of the foetus is established, originates purely in a principle of tenderness towards the foetus, and a foetus is an object of this tenderness, although it be begot in adultery since it is innocent of any offence; whence procuring the abortion of it is illegal; marriage, therefore, with a woman pregnant by adultery is invalid, equally with one where the parentage of the foetus is ascertained, and for the same reason. Our doctors, upon this point, argue that the woman is lawful in matrimony, on the authority of the sacred writings, the Koran saying, 'All women are lawful to you, excepting those within the prohibited degrees : ' and the prohibition of cohabitation until after delivery, is merely on account of the impropriety of sowing seed in a soil already impregnated by another, a prohibition which occurs in the traditions. With respect to what Aboo Yoosaf alleges, that 'the illegality of the marriage in cases where the parentage of the foetus is established, originates purely in a principle of tenderness towards the foetus,'- it is altogether unfounded, because the nullity of the marriage in that case originates in a regard for the right, not of the foetus, but of the father.

32. A void marriage is no marriage at all. 11 does not create any civil rights or obligations between the parties. (Vide - page 237 - Mulla's Principles of Mahomedan Law).

33. Our conclusion from what we understand from the doctrines and formulations of the Muhammadan Marriage Law as expounded by the learned authors and commentators is that the marriage of a muhammadan male with a muhammadan female pregnant by whoredom is illegal and cannot have any legal consequence of a marriage to those who follow Hanafi Law also.

34. Now we shall consider how this aspect has been considered by this Court as well as by other High Courts in India. In *Abdul Rahimankutty v. Aysha Beevi* : AIR1960 Ker101, the question arose in a case where maintenance was asked for a child. An unmarried young woman, who was working in the house of the petitioner as a domestic servant, delivered a child and she claimed maintenance for the child from the petitioner. When the petitioner was told about the pregnancy he married the girl and within a few days drove her out of his house. Though the petitioner denied the paternity of the child, the court believed the respondent's case and passed an order for maintenance. The important question that was considered by the court was that in view of the fact that the child was born within 280 days after the alleged dissolution of the marriage, should the child be considered as the child of the petitioner by drawing the presumption under Section 112 of the Evidence Act. So naturally, the question of the existence of a valid marriage between the parties became the stereo-bate of the contentions. Considering the point, the court referred to the decisions reported in *Abdul Latif Khan v. Niyaz Ahmed Khan* (1909) ILR 31 All 343 and *Kulsumbi v. Abdul Kadir*, ILR 45 Bom 151 : AIR 1921 Bom 205. In the second case, the wife filed a suit against her husband to recover her dower. It was proved that within five months of the marriage of the plaintiff in that case, a child was born to her and the husband therefore turned her out of his house. The husband denied his liability for dower on the ground that the marriage was invalid owing to the concealment of pregnancy at the time of marriage. This defence was not accepted. In this case - ILR 45 Bom 151 : AIR 1921 Bom 205 - the earlier case, namely ILR 31 All 343 was cited. That was a case where it was found that there was active concealment of the fact of a serious illness at the time of marriage which rendered the marriage totally invalid. It was found in that case that the marriage was not consummated. Though the counsel in ILR 45 Bom 151 : AIR 1921 Bom 205 relied on ILR 31 All 343, Heaton, J. distinguished the case reported in ILR 31 All 343 on the ground that there was no consummation of marriage in that case. This case was commented upon by Tyabji in his commentary on Mohammedan Law. That commentary was relied on by Joseph, J. in : AIR1960 Ker101. The comment of Tyabji is reproduced here:

The plaintiff at the time of her marriage with the defendant concealed her illicit pregnancy; the parties lived together and presumably the marriage was

consummated. A fully developed child was born within 5 months. The child was begotten by an unknown father. Then the husband turned the wife out of his house but did not divorce her. At her suit, the husband was held liable for prompt mahr. Submitted that on the points argued the decision was erroneous, but that the real points were not taken or decided; Sections 36, 38 & 40 were entirely overlooked by the husband's (defendant's) advisers; it was not argued that the wife being 'pregnant by whoredom' marriage was prohibited during pregnancy; that there was no valid marriage at all; that the marriage was from the start illegal and of no effect; that no cancellation was necessary, or in fact possible as there was no marriage to cancel. The only argument put forward was that the marriage could be cancelled by the husband on some ground similar to those in Sections 201-209, an argument that was quite untenable and had to be rejected by the Court in spite of its great anxiety (of which no secret had been made) to decide if possible against the wife.

The view of Tyabji expressed in the above quoted passage indicates that a marriage with a woman pregnant by whoredom is not a valid marriage at all. The emphasis is that the marriage from the start was illegal and of no effect. It is held that no cancellation of the marriage was necessary. It was also said that there was no possibility for cancellation of a marriage since there was no marriage at all. Joseph, J. in conclusion held : 'I am inclined ' to take the view that there is no valid marriage in this case so as to attract the presumption under Section 112 of the Evidence Act.' As stated earlier, the correctness of this decision has been doubted by a single bench of this Court. We are of opinion that the decision of Joseph, J. in : AIR1960 Ker101 is perfectly correct.

35. We have now considered only the question of validity of the marriage in the light of the principles and doctrines of Muslim Law. We think we have to consider the question in a different angle, namely whether the contract of marriage is valid applying the principles that have to be employed in ascertaining the validity of a contract pure and simple. The learned Counsel for the respondent submitted that the contract is invalid and void in the sense that really no contract was formed at all since a free consent of the parties to the contract is the core of the different elements for a valid contract and that such a free consent was absent in the

contract of marriage in question. He also submits that the contract is vitiated by fraud. Normally a contract, if vitiated by a vitiating cause, the party can rescind that contract but it will not in all cases nullify the contract so as to treat the contract as not born or has not come into existence at all. The learned Counsel submits that in cases where, and particularly in case of a contract of marriage if vitiated by fraud affecting the consent element of contract, the contract will be set at naught retrospectively so as to consider that no transaction has ever emerged, He submits that the contract has to be considered as not formed at all. We shall consider these questions separately.

36. First we shall consider how far there is lack of free consent in this contract of marriage. It is in evidence that the fact that the petitioner was pregnant was not disclosed at the time of marriage. The evidence is that the respondent was ignorant about the pregnancy of the petitioner at the time when he contracted the marriage. Since this fact was a material fact to be disclosed, which if disclosed, would have influenced the mind of a reasonable person in determining whether to enter into the proposed contract or transaction at all, having regard to its class and character, the respondent submits that there was no free consent on the part of the respondent, when a seeming consent was obtained for marriage without the knowledge of the material fact of five months anti-nuptial pregnancy of the respondent. The further ancillary question is whether there was an obligation on the part of the petitioner to disclose the fact that she was pregnant at the time of marriage. This has to be decided not on the fact that the undisclosed fact was material to the contract itself or to the precise risk undertaken but as to the fact whether it was material and relevant to the inducement, that is to say whether the fact was; of a nature which would affect the judgment of the party from whom the fact was withheld. We make it clear that in order to establish materiality, it is not necessary that the disclosure of the uncommunicated facts would inevitably have deterred the party from entering into the contract or transaction, on any terms, or on the terms proposed. It is enough to show that it might possibly have had such a deterrent effect, and would certainly have had some effect upon his, judgment, in the sense that it would have presented something for him to weigh and take into consideration, and would have 'given him pause'. Certainly there are many things which a man might desire to have communicated to him if they existed at the time

of making a contract of marriage, such as that the other party is in debt or to other liabilities or some circumstances relating to the status of the person, his/her temper, his/her disposition, the disclosure of which would have some influence over the judgment of the parties concerned But of all things which an affianced man or woman cannot claim as of right to be disclosed to him or her before the contract of marriage, though he or she may well wish such a disclosure, as a matter of honour, delicacy, or decency. Certainly many aleatory hazards are there, when venturing upon what proverbial cynicism has styled 'the lottery of marriage', which he or she must be supposed to take upon himself or herself. But even a gambler is entitled to suppose that the gambling be just, that the lots be drawn genuinely and that nothing shall be concealed from him tending to show the contrary, or that the proposed prize or stake is something totally different in character from that which it purported to be. We would like to approach this case on this principle, even though we feel that this is an arena though not untouched, has only a scanty field of express authority.

37. Certainly there is a very large debatable territory intermediate between the class of cases where exposure of all material facts is clearly mandatory and binding and that which it clearly is not. Erie, C.J. in *Baker v. Cartwright* (1861) 10 CB (NS) 124 at 127 observed that no fact need be disclosed except unchastity on the part of the woman, and in that case, the previous attack of insanity and confinement in a lunatic asylum was found to be a fact which need not be disclosed. This case was commented upon by Bose, J. as he then was, in *Haji Ahmad v. Abdul Gani* AIR 1937 Nag 270.

38. We think at least here we get an undebatable territory. Of course there are decisions and dicta that other matters than actual incontinence and positive acts of misconduct on the part of the woman must be divulged, such as a permanent and serious disease or physical infirmity on the part of either of the parties or a general loss of character or reputation on the part of the woman - Vide *Foulkes v. Sellway* (1800) 3 Esp 236 and *Atchison v. Baker* (1797) 1 Peake 103. The same principle is stated in *Abdul Latif v. Niyaz Ahmad Khan* (1909) ILR 31 All 343. There it was held that an active concealment of the fact that one party to the contract of marriage was suffering from a serious illness at the time of her marriage will

render the marriage invalid. Bose, J. as he then was, also held in *Haji Ahmad v. Abdul Gani* AIR 1937 Nag 270 that concealment of a serious disease like epilepsy will render the marriage invalid. It has to be noted the objects of the institution of marriage as disclosed from Sacred Koran are the promotion of a normal family life and the legislation of children. 'Marriage is an institution ordained for the protection of society and in order that human beings may guard themselves from foulness and unchastity'. The material fact not exposed in this case goes to the very root and object of the contract, which will have a direct bearing on the judgment of the party from whom the fact is withheld, as to whether he has to consent for the marriage, so there is lack of free consent in the contract of marriage.

39. Yet another look on this aspect of the case is that whether disclosure of the fact now concealed will amount to a non-disclosure just like a non-disclosure of a material fact in a contract of good faith, in other words, contracts *uberrima fides*. We agree with the counsel that a marriage under Muhammadan Law which has to be considered as a solemn pact requires from the parties an obligation to divulge with candour and completeness, facts which are crucial and important which will certainly induce the judgment of the parties as to whether they should enter upon the contract or not. Though a marriage contract is not classified as an *uberrima fide* contract, Bose, J. as he then was, held in AIR 1937 Nag 270 that it was to be treated as a 'like contract'.

40. In a case of contract of marriage, it is not merely a case of one party necessarily trusting the other for full information as to those matters which from the nature of the contract, transaction or relation, he cannot ordinarily be supposed to know himself. If it is a case of a 'like of an *uberrima fide* contract', the only kind of disclosure which would satisfy the requirement of law is a disclosure which is both (1) exact and complete and also (2) explicit and unambiguous. Any communication which falls short of the above, whether failure to divulge the whole truth in clear language arose from any reason - intellectual incapacity or mere carelessness or on the other hand from a pre-conceived and fraudulent design - is in law no disclosure at all. Judges frequently use the words full and fair disclosure. A partial or imperfect revelation of the facts or a half disclosure will not satisfy the requirement, Bose, J. as he then was, in AIR 1937 Nag 270 observed:

These are known as contracts *uberrima fides* and the most common examples are contracts of insurance, sale, suretyship, release and compromises. But contracts to marry also come under this category though the case law on the subject is meagre and conflicting. Thus in 10 CB (M) 124 (*Baker v. Cartwright*) it was decided that a previous attack of insanity and confinement in a lunatic asylum need not be divulged. I hardly think that that would be regarded as sound law today with our present day knowledge of insanity and its ramifications.

(Emphasis added)

41. If we treat the contract of marriage as a contract *uberrima fide*, certainly the nondisclosure of the fact that the petitioner was five months pregnant by whoredom is certainly a fact which will render the contract void. As stated earlier, it is really a case of lack of free consent in the formation of the contract. The crucial and important material fact which would have affected the judgment of one of the parties to the contract was happened to be a fact which was in the exclusive knowledge of the other party. This fact remained undisclosed when the contract was formed. This will make the contract only a semblance of a contract, since the core element of the contract, namely free consent is wanting.

42. Another view that is possible in this case is to say that the case involves a perpetration of deceit or an exercise of fraud by the respondent. If the contract has been formed as a result of a fraud practiced by one of the contracting parties on the other innocent party, certainly the contract is voidable at the instance of the party who has been defrauded. Of course, the explanation to Section 17 of the Contract Act says that mere silence in itself is not fraudulent unless there is a duty to speak or unless the silence is in itself equivalent to speech which of course is a very different situation from the one in deceit. It is not difficult for us to discern a strong element of fraud in this contract of marriage on the part of the petitioner. The Muhammadan Law of marriage tells us that a contract of marriage brought about fraudulently is void. We are of opinion that in applying Section 17 of the Contract Act, we have to say that in the matter of a contract of marriage fraud would render the contract void when it is avoided by the party who has been deceived. This proposition can be fortified on the principle that when a contract is

rescinded on the ground of fraud, the act of rescission operates retrospectively and the contract stands rescinded ab initio just as it had never come into force for any purpose.

43. In (1923) AC 733 (Abram S. S. Co. v. Westville S. S. Co.) it was observed : 'In the words of Lord Atkinson 'where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it and refuses to be bound by it, the expression of his election, if justified by the facts terminates the contract, puts the parties 'in status quo ante' and restores things, as between them, to the position in which they stood before the contract was entered into'. The same principle is stated by the Supreme Court in : [1954]1SCR391 . (Central National Bank Ltd. v. United Industrial Bank Ltd.)'

In some cases, consent induced by false representation may not be free but may nevertheless be real. In such cases, the consent is negatived and the transaction is held merely voidable but not void; so that the party misled by the fraud, has the option to treat the transaction either as valid or as altogether void even as against innocent third persons; but the party guilty of fraud is estopped from denying the contract if the party deceived chooses to affirm the transaction. (Vide - Singhal & Subrahmanyam's Indian Contract Act - 2nd Edn. Page 412).

44. The marriage in this case has to be treated as if it has never been in force. The result is that in law there was no marriage between the petitioner and the respondent. Since there was no marriage between the petitioner and the respondent, the petitioner at no time remained as a wife of the respondent and the respondent was never a husband of the petitioner. So there was no occasion for the petitioner to be a 'wife' by the inclusive definition of Section 125, Criminal Procedure Code.

45. We now disclose the process of decision employed by us in this case. We have remembered the aphorism that in the decision process, the courts are dominantly coerced not by the essays of their predecessors but by a sure thing - by an intuition of fitness of solution to the problem. Vide Oliphant A Return to stare decisis. General propositions do not decide concrete cases and the life of the law

has not been logic, it has been experience. Lord Eldon has said that it is better that the law should be certain than that every judge should speculate upon improvements in it. A just solution for the particular case is the crucial factor in the decision process. We have tried to remember that equitable rule of decision that considerations of justice are directly relevant to the justification of any decision.

46. Justice - we mean justice according to law - the justice that stems from the application of sure and settled principles and law to proved or admitted facts. We also share the root belief of Lord Denning in this case. He said : 'My root belief is that the proper role of the Judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is in the province of the Judge to do all that he legitimately can to avoid that rule - or even to change it - so as to do justice in the instant case before him...I would emphasise however the word legitimately. The Judge is himself subject to the law and must abide by it.'

47. It is extremely difficult for us to fasten a liability under Section 125, Cr. P.C. (a liability in the language of the Supreme Court founded upon the individual's moral obligation to the society to prevent vagrancy and destitution) on an unfortunate victim of a marital fraud solely on account of the misfortune that he had undergone a ritualistic process of a contract of marriage without least anticipating that he was contracting a marriage with a lady who had five months anti-nuptial illicit pregnancy. We find it difficult to direct a person who has innocently gone through the process of a contract of marriage with a lady pregnant by whoredom to pay maintenance allowance to her.

48. One other question to be decided in this case is what is the law that is applicable to Muslims in India, whether it is Hanafi or Shafie Law. The reference order indicates that there is a controversy as to whether the Muslims of Malabar area or for that matter any part of the State are presumed to follow Hanafi Law or Shafie Law. We think that the matter has been settled by the decisions of the Supreme Court and High Courts in India. We may cite the following decisions:

Katheessa Umma v. Narayanath Kunhamu AIR 1964 SC 27 ; K. Marakkar Haji v. T. Kandankutty : AIR1967 Ker78 ; Abdulla Beary v. Alikunhi Beary, 1957 Ker LJ 731; Seethi v. Mariyakutty, 1954 Ker LT 249 : AIR 1954 Trav-Co 432 and

Akbarally v. Mohmedally AIR 1932 Bom 356.

49. : [1964]4SCR549 was a case from North Malabar. It is seen that the parties are treated as Hanafis. In : AIR1967 Ker78 , Madhavan Nair, J. held that among Indian Muslims there is a presumption that they follow Hanafi Law and where deviation therefrom is sought to be relied on, it should be pleaded and proved as a fact. In 1957 Ker LJ 731, a Division Bench of this Court relying on 1954 Ker LT 249 : AIR 1954 Trav-Co 432 and AIR 1932 Bom 356 held that as the great majority of Muslims in India follow the Hanafi school of Sunni Law, the Courts presume that Muslims in India follow the Hanafi Law unless the contrary is alleged and proved and that the burden of proof lies on him who asserts otherwise In 1954 Ker LT 249 : AIR 1954 Trav-Co 432, Kumara Pillai, J. held relying on AIR 1932 Bom 356 that the great majority of Muhammadans in India follow the Hanafi school of Sunni Law and that the courts presume that Muslims in India follow the Hanafi Law unless the contrary is alleged and proved.

50. Mulla in his book on Principles of Mohammedan Law, Section 28, Chap. III says that Mohammedans are divided into sects, namely the Sunnis and the Shias, and Sunnis are divided into four sub-sects., namely the Hanafis, the Malikis, the Shafies and the Hanbalis. He further says that the Sunni Mahomedans of India belong principally to Hanafi School. The author says that there is a presumption as to Sunnism. We quote : --

The great majority of the Mahomedans of this country being Sunnis, the presumption will be that the parties to a suit or proceeding are Sunnis, unless it is shown that the parties belong to the Shia sect.

The author has relied on (1903) ILR 30 Cal 683 (1933) 140 1C 829 : AIR 1933 Lah 80, 34 Bom LR 655 : AIR 1932 Bom 356 AIR 1954 Trav-Co 432.

51. There is absolutely no evidence in this case that the parties are governed by any law other than the Hanafi Law.

52. We hold that the courts can safely presume the Muslims of our State are following the Hanafi Law, and where departure therefrom is resorted to be proved,

it must be pleaded and proved as a fact.

On the aforesaid discussion, we hold that the petitioner is not entitled to an order for maintenance under Section 125, Cr. P.C. The petitions are dismissed.

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