

Equivalent citations: II (1997) DMC 83

Bench: R Khurana

Darje Wangial vs Karam Singh on 18/11/1996

## JUDGMENT

R.L. Khurana, J.

1. This criminal revision has been filed by the petitioner under Section 397 of the Code of Criminal Procedure against the order dated 25.8.1993 of the Sessions Judge, Shimla setting aside the order dated 12.11.1992 of the Chief Judicial Magistrate, Kinnaur granting maintenance under Section 125, Code of the Criminal Procedure to the petitioner.
2. The sole ground for determination in the present case is-whether the petitioner is illegitimate child of the respondent and entitled to claim maintenance from the latter.
3. The petitioner, a minor child, through his mother Smt. Ganga Mani filed a petition under Section 125 of the Code of Criminal Procedure claiming maintenance at the rate of Rs. 500/- per month. It was averred that the mother of the petitioner and her friends had decided to arrange a dinner party on 23.5.1989 in Village Kanam for a newly wedded couple Suresh Pal and Mangal Devi. On 22.5.1989 at about 9 p.m. the mother of the petitioner accompanied by her friend Inder Mani went to inform other friends about the party. When they were on the way to the house of Inder Dassi at Garbong, they met the respondent and one Mohinder Singh on the way. The respondent forcibly took the mother of the petitioner away in the fields of Udey Singh, while Mohinder Singh took away Inder Mani. The respondent and Mohinder Singh respectively subjected the mother of the petitioner and Inder Mani to sexual intercourse. As a result of such sexual intercourse, the mother of the petitioner as well as Inder Mani became pregnant. Mohinder Singh, above named married Inder Mani some time in the month of February, 1990 and a son was born to her out of the loins of said Mohinder Singh on 26.2.1990. The respondent did not marry the mother of the petitioner. He was selected as a Clerk in the office of the District Excise and Taxation Office, Kullu in the month of December, 1989. He has approached time and again by the mother of the petitioner for marriage, but he kept on delaying on one pretext or the other. Left with no alternative, the mother of the petitioner sent S/Sh. Deva Lal and Jundhan Ram of Village Kanam to the respondent, who is alleged to have admitted having had sexual intercourse with the mother of the petitioner and the resultant pregnancy. He further assured the said two persons that he would be coming on leave shortly and thereafter he would perform a marriage with the mother of the petitioner in accordance with the custom prevailing in District Kinnaur. The respondent also handed over a letter to said Deva Lal for being delivered to his father. The mother of the petitioner kept on waiting, but the respondent did not turn up. The petitioner was born on 19.2.1990 from the loins of the respondent. Therefore, by alleging himself to be the illegitimate child of the respondent, maintenance was claimed by the petitioner from the respondent.
4. The respondent while resisting the petition denied the petitioner to be his illegitimate child. It was averred that he never had any sexual intercourse with the mother of the petitioner and that the petitioner was not born from his loins.
5. Three witnesses were examined on behalf of the petitioner apart from his mother, who appeared as AW-1. In rebuttal, the respondent appeared as his own witness as RW-1 besides examining one Arjun Singh as RW-2 and Krishan Dev, father of the respondent as RW.3.
6. The learned Magistrate, upon consideration of the material placed before him came to the conclusion that the petitioner is the illegitimate child of the respondent and as such entitled to maintenance. He, accordingly,

vide his order dated 12.11.1992 allowed maintenance at the rate of Rs. 300/- per month in favour of the petitioner.

7. The respondent went up in revision before the learned Sessions Judge being Criminal Revision No. 27-S/10 of 1993. The said revision petition was allowed by the learned Sessions Judge on 25.8.1993. The order of the learned Magistrate granting maintenance in favour of the petitioner was set aside and it was held that the petitioner was not proved to be the illegitimate child of the respondent.

8. It is in the statement of the mother of the petitioner as AW-1 that she was subjected to sexual intercourse by the respondent with her consent. She has gone to the extent of stating that she was subjected to sexual intercourse by the respondent on two to three occasions even prior to 22.5.1989.

9. In a case where a child is alleged to have been conceived and born due to the sexual intercourse between a man and woman with the consent of both the parties, the woman will be a party to that sexual intercourse with her consent. In view of this position, her evidence will be that of an accomplice. Therefore, it will not be safe to rely on the evidence of a woman who alleges that a particular man is the father of a child born by her due to the sexual intercourse with her without proper corroboration especially when the paternity of the child itself is in issue.

10. In *Thakur Prasad v. Mt. Godavati Devi*, AIR 1951 Patna 514, the question at issue was whether a certain man was the father of a certain child. It was held : "It is prima facie improper to accept without corroboration, the mere statement on oath of the mother who asserts the paternity. Her evidence in such a case cannot but be highly interested, and it would be unreasonable and improper for any Court to act merely on her own statement without some independent corroboration thereof. Such corroborative evidence may be circumstantial but it must be such as to corroborate the evidence of the woman that the child was born of the alleged father. The factum of improper association after the child was born would not be sufficient to corroborate her evidence."

11. In *Bhaskarn v. Kunhipennu*, AIR 1960 Kerala 110, maintenance was granted in favour of the child by the Magistrate on the basis of the sole uncorroborated testimony of the mother. Relying upon the ratio laid down in *Thakur Prasad's* case (supra), it was held by the Kerala High Court that the Trial Court was wrong in relying on uncorroborated testimony of the mother to hold that the child was born out of the loins of that particular man.

12. Again in *Muhammed v. Sulekha*, 1981 Cri. LJ NOC 40 (Kerala), it has been held that as a matter of prudence, the Court must seek corroboration to the oral testimony of the mother before acting upon such evidence. It was further held that the Courts cannot in all cases insist on the person who is alleged to be the father of the child, to allege and prove any motive for the woman to put forward such a case.

13. A similar view has been taken by the Orissa High Court in *Smt. Ahalya Bariha @ Barihani v. Chhelia Padhan*, 1992 Criminal Law Journal 493=I (1992) DMC 158, it was held in the following terms : "While deciding of the case of entitlement of a child, paternity and not legitimacy has to be seen. Where maintenance is claimed for an illegitimate child from an alleged father, it is not enough that defendant would have been the father, but the Court has to find out that in all reasonability no one else could have been the father."

14. In *Ummini Kunjuraman v. Meenakshi Symala*, 1970 Mad. L.J. 573, their Lordships have held as follows : "The burden upon the woman to establish the paternity of the child and to show that the person from whom she claims maintenance for the child is the father of the child. It is prima facie improper to accept without corroboration mere statement on oath by the mother who asserted that the opposite party is the father of the child. The evidence of the wife shall be corroborated either by direct or some circumstantial evidence to establish that during the period when the wife could have conceived the child, the wife and the alleged father had some access to each other."

15. A similar view has been taken by the High Court of Karnataka in *Chaya v. K.G. Channappa Gowda*, 1993 CrI.L.J. 767 and by the Gauhati High Court in *Kh. Ningol Ibetombi Devi & Anr. v. Dr. Pukharambam Ibomcha*, 1993(1) Crimes 182.

16. The evidence coming on the record in the present case, is, therefore, required to be examined in the light of the principles quoted above. AW-1 Smt. Ganga Mani, the mother of the petitioner has stated that on 22nd May at about 9 p.m. she alongwith Inder Mani was going to invite Inder Dassi for the dinner party. She was met on the way by the respondent and Mohinder Singh. She has further stated that the respondent caught hold of her and took her to a nearby field and subjected her to sexual inter course. Mohinder Singh took Smt. Inder Mani away to the field and subjected her to sexual intercourse. It is further in the statement of AW-1 that as a result of such inter course, she became pregnant and she informed her parents about her pregnancy about a month after having detected the factum of her pregnancy.

17. AW-3 Deva Lal is the father of the mother of the petitioner. He stated that he came to know about the pregnancy of AW-1 Ganga Mani in the month of January, 1990. AW-4 Chungdutt Ram who is the maternal uncle of Ganga Mani has also stated that he came to know about the pregnancy of AW-1 in January, 1990. The version coming in the evidence of AW-3 and AW-4 about the knowledge of the pregnancy of AW-1 stands contradicted by the statement of AW-1 herself wherein she has categorically stated about her having informed her parents regarding the pregnancy about one month after deriving the knowledge that she was pregnant. Reading the statement of AW-1, it can reasonably be taken that she must have informed her parents about her pregnancy sometime in July/August, 1989. AW-2 Inder Mani is the lady who was allegedly accompanying AW-1 Ganga Mani at the time she was subjected to sexual intercourse by the respondent. AW-2 is the wife of Mohinder Singh, who was allegedly in the company of the respondent when AW-1 was subjected to sexual intercourse by the respondent. Admittedly, AW-2 is a close friend of AW-1. According to the petitioner's own case, Mohinder Singh, the husband of AW-2 is a friend of respondent and on the relevant day he was accompanying the respondent. This Mohinder Singh is alleged to have subjected AW-2 to sexual intercourse before marrying her. Surprisingly this Mohinder Singh has not been examined in the present case by the petitioner to show that he was accompanying the respondent at the relevant time when AW-1 was subjected to sexual intercourse by the respondent.

18. Much reliance has been placed on the letter Ext. PW-3/A, alleged to have been written by the respondent to his father and handed over to AW-3 for being delivered to the father of the respondent. A perusal of this letter shows that it contains nothing either about the sexual relations between AW-1 and the respondent or with regard to the paternity of the petitioner. There is only a mention that the respondent has come to know about certain facts, about AW- 1 which he would disclose personally to his father when he comes on leave. Vide letter Ext. RW-1/A written by the respondent to his father, he has specifically denied any relationship between him and AW-1 or that AW-1 was pregnant from his loins.

19. The knowledge of AW-3 and AW-4 about AW-1 being pregnant from the loins of respondent is based upon the information alleged to have been given to them by AW-1 herself. They are not having any independent source of information. AW-2 who is alleged to be accompanying AW-1 at the relevant time also had not seen AW-1 being subjected to sexual intercourse by the respondent. Her testimony is to the effect that she was informed by AW-1 about having been subjected to sexual intercourse by the respondent.

20. Another significant aspect of the case is that though the petitioner is alleged to have been born on 19.2.1990, nothing has come on record to show that the factum of the birth of the petitioner came to be entered in the relevant records maintained by the Panchayat with regard to births and deaths of the persons. Such births entry atleast would have been material to show as to who has been recorded as the father of the petitioner. On the failure of the petitioner to prove such evidence, an adverse inference will have to be drawn against the petitioner.

21. The testimony of AW-1, the mother of the petitioner, has thus remained uncorroborated either by the direct evidence or by circumstantial evidence. Therefore, it cannot be held that the petitioner is the illegitimate child of the respondent. The learned Sessions Judge has, upon proper appreciation of the evidence coming on the record, come to a right conclusion that the petitioner is not the illegitimate child of the respondent, and, as such, not entitled to claim maintenance from him.

22. Consequently, the present petition fails and the same is accordingly dismissed.