CASE NO.:
Appeal (crl.) 635 of 2003

PETITIONER:
AMINA

RESPONDENT:
HASSN KOYA

DATE OF JUDGMENT: 28/04/2003

BENCH:
M.B. SHAH & ARUN KUMAR

JUDGMENT:
JUDGMENT

2003(3) SCR 999

The Judgment of the Court was delivered by ARUN KUMAR, J. Leave granted.

We have heard the learned counsel for the parties at length. The appellant was married to respondent on 28.12.1972. As per the respondent's case a girl child was born to the appellant on 28.4.1973/3.5.1973. Respondent divorced the appellant on 2.5.1977. The appellant filed a petition on 14.12.1977 under Section 125 of the Code of Criminal Procedure seeking maintenance for herself at the rate of Rs. 150 per month and for the daughter at the rate of Rs. 125 per month. In reply to the petition the respondent admitted the factum of the marriage, however, he set up a case that the fact that the appellant was already pregnant at the time of marriage, was concealed from him by the appellant, the marriage was therefore, invalid and void. As such he was not liable to pay maintenance. It was further submitted that the child was not born to the appellant through the respondent and, therefore, the respondent had no obligation to pay any maintenance qua the child. The learned Magistrate, 1st Class, Quinlandy held that the marriage was valid and, therefore, he directed payment of maintenance at the rate of Rs. 75 per month by the respondent to the appellant. No maintenance was allowed for the child because the child was believed to be not fathered by respondent. This order was passed on 9th February, 1979. Both the parties challenge the said decision of the Magistrate to the extent it was against them. The Addl. Sessions Judge, Kozhikode by his order dated 5 November, 1980 allowed the revision petition filed by the respondent (husband) and dismissed the revision petition filed by the appellant. The marriage was held to be invalid by the Addl. Sessions Judge, Kozhikode Division and that was the main reason for accepting the revision filed by the husband. Since the marriage was held to be invalid it followed that there was no obligation to pay any maintenance. The High Court of Kerala dismissed the revision petition filed by the appellant against the order of the Addl. Sessions Judge, confirming the finding that the marriage was void. Hence the present appeal.

The basic question for consideration before this Court is whether there was a valid marriage between the parties? In this connection it is to be noted that the factum of marriage is admitted. This means that the marriage took place between the parties on 28.12.1972. It is respondent's own case that a girl child was born to the appellant on 28.4.1973/3.5.1973. The appellant appeared as a witness as P.W. 1. The respondent also appeared as a witness. He admitted the marriage, but submitted that the marriage was invalid and void because the lady was pregnant, which fact was concealed from him at the time of marriage. In support of his case that the appellant was five months pregnant on the date of the marriage he produced on record Exhibits Dl and D3(a) showing that appellant gave birth to a girl child. According to Exhibit DI a girl child was born to Amina-appellant on 3.5.1973. The names of parents are given as that of the appellant and the respondent in Exhibit Dl while the name of the girl child is given as Soudha which is

admittedly the name of the girl child in this case. The evidence of the doctor who performed the delivery shows that the respondent had attended on his wife in the hospital when the appellant delivered the girl child. Exhibit D3(a) is the entry in the official register regarding the birth of the girl, child. By producing this evidence though the respondent succeeded in proving that a child was born to the appellant on 3.5.1973, he revealed another fact. Exhibit Dl proves that the name of the respondent is mentioned as father of the girl child and the evidence of the doctor as P.W. 6 shows that the respondent was attending on Amina, the appellant, at the time of her delivery. The name of the respondent as father of the child must have been given for purposes of official record by the responded himself.

The legal question that arises for consideration is whether such a marriage can be said to be void or illegal. It is settled law that under the Muslim Law a marriage is a contract unlike the Hindu Law, where it is a sacrament. The respondent pleaded a case that he was not aware of the fact that the appellant was pregnant at the time of marriage and as this fact was concealed by the appellant from him, it rendered the contract of marriage as void. Both the courts below i.e. the lower appellate Court and the High Court believed the respondent on this aspect which led them to hold that the marriage was void and illegal. In our view, this is a basic fallacy in the judgment of the courts below. They accepted that respondent was not aware of pregnancy at the time of marriage. This resulted in the finding that the marriage was invalid. We are unable to accept this reasoning. It is very difficult to believe-that a woman who is five months pregnant will be able to conceal the pregnancy from the husband. Such an advanced stage of pregnancy cannot be concealed as the pregnancy starts showing by that time. In any case the pregnancy cannot be concealed from the husband. A husband will at least know for sure that the wife is pregnant specially when the pregnancy is five months old. Therefore we cannot accept that the respondent did not know at the time of marriage that the appellant was already pregnant. If this fact was known to the respondent, the marriage cannot be said to be illegal or void.

Next we have to notice the conduct of the respondent at the relevant time. He goes through the marriage. He does not raise any objection even after the marriage. He is present at the time of delivery of the child. Presumably he give his own name as the name of the father of the child for the official record. Even thereafter for nearly four years he goes along with the marriage and brings up the child while treating appellant as his wife. The divorce is said to have been given on 2nd May, 1977. Any person who learns that his newly married wife is already pregnant for five months and who does not accept that marriage or pregnancy, will not behave in the manner in which respondent did. If we believe the respondent that he did not know about the pregnancy of the appellant at the time of marriage, how can we accept his conduct after the marriage? If what respondent is saying is true, a normal reasonable person would have immediately turned out the wife from his house on coming to know of the fact of pregnancy. Nobody will continue with such a marriage for four and half years, specially when a child is born just after four months of the marriage. Respondent says that the child is not his yet he gives his name to the child and continues to bring up the child for nearly four years after she was born. When it comes to the question of paying maintenance he says the marriage was invalid and the child is not his.

Our attention has been invited to the case of Kulsumbi Kom Abdul Kadir v. Abdul Kadir walad Saikh Ahmad, reported in ILR (1921) Vol. XLV Bom 151. This was also a case of marriage of a pregnant woman. Consummation of marriage was not in dispute. However, the husband turned out the wife on her pregnancy coming to his knowledge. The wife sued for dower. It was held that concealment of pregnancy by the wife at the time of marriage did not render the marriage invalid, therefore, the husband was held to be liable to pay dower. Thus in the facts of the present case we are unable to accept the view taken by the courts below that the fact of pregnancy was concealed

by the appellant from the respondent at the time of marriage and for that reason the marriage of the parties was invalid and void, and, therefore, there was no liability on the part of the respondent-husband to pay maintenance to the appellant. The impugned judgment of the Addl. Sessions Judge, Kozhikode as well as of the High Court of Kerala are based on a finding that pregnancy was concealed by the appellant from the husband which rendered the marriage invalid and void. In our view, such a finding is wholly unwarranted, incorrect and unacceptable. In the facts of the present case as discussed above, it has to be held that the respondent was fully aware of the pregnancy of the appellant at the time of the marriage and, therefore, he cannot be heard to say that the marriage was invalid or void for that reason. The Addl. Sessions Judge had relied on a judgment of the Kerala High Court in the case of Abdullah v. Beepathu, reported in ILR (1967) Vol.1 Kerala 361 wherein it was held that pregnancy of the bride at the time of marriage ipso facto invalidates marriage unless the bride proves that this fact was within the knowledge of the bridegroom at the time of marriage. In our view, this decision in fact, supports the view taken by us in the present judgment. As per our finding the facts on record show that the husband was aware of the pregnancy of the wife at the time of the marriage. Therefore, as per this judgment such a marriage cannot be said to be invalid.

The appeal is allowed. The judgment of the Addl. Sessions Judge, Kozhikode and that of the High Court of Kerala, are set aside and that of the Judicial Magistrate, 1st Class, Quilandy dated 9th February, 1979 is restored. The appellant will be entitled to costs throughout. Liberty to the appellant to seek enhancement of the rate of maintenance in accordance with law.