

(1996) 12 CAL CK 0003**Calcutta High Court****Case No:** F.A. No. 118 of 1992

Subhendu Mishra

APPELLANT

Vs

Smt. Runu Mishra

RESPONDENT

Date of Decision: Dec. 23, 1996**Acts Referred:**

- Evidence Act, 1872 - Section 112
- Hindu Marriage Act, 1955 - Section 12, 12(2)(b)(iii)

Hon'ble Judges: Gitesh Ranjan Bhattacharjee, J; Devendra K. Jain, J**Bench:** Division Bench**Advocate:** S.P. Ray Chowdhury, Phani Das and Anil Kr. Rakshit, for the Appellant; B.K. Basu, Monish Sen and P.K. Chatterjee, for the Respondent**Final Decision:** Dismissed

Judgement

Gitesh Ranjan Bhattacharjee, J.

This is an appeal against the judgment and decree of dismissal passed by the learned Additional district Judge 2nd Court. Burdwan in Matrimonial Suit No. 4 of 1989/7 of 1987. The petitioner appellant Subhendu Mishra filed the said suit against his wife Smt. Runu Mishra the opposite-party-respondent for decree of nullity of marriage u/s 12 of the Hindu Marriage Act. 1955. The ground on which the petitioner prayed for decree of nullity of marriage was that the respondent wife was at the time of marriage pregnant by some person other than the petitioner-husband. The petitioner's house is at village Malgram under P.S. Ketugram and the respondent's father's house is at village Chakta under the same P. S. Admittedly the marriage between the parties took place according to Hundu rites on 19-5-86 corresponding to 4th Jaistha. 1393 B.S. at Chakta. Thereafter a male child was born to the respondent-wife on 22-8-86 that is about three months after the marriage. The suit for decree of nullity was filed by the petitioner-husband on 14-1-87 on the ground that on the date of the marriage the respondent was pregnant by some person other than the petitioner-husband. The petitioner's case

is that he is not the father of the child that was born within about three months of the marriage and the birth of the child took place in the respondent's father's house at Chakta and then the petitioner came to learn on enquiry that the respondent gave birth to a male child on 22-8-86. It is the petitioner's allegation that by suppressing the fact that the respondent was pregnant by some other person she was given "in marriage with the petitioner and soon after the marriage the for Dwiragaman and thereafter came to her matrimonial home and stayed there for two or three days and then went back, to her father's place at Chakta and that the marriage has not been consummated and the respondent on one plea or other never allowed the petitioner to have access to her and on false pretext kept everything concealed. It is the further ease of the petitioner, as stated in the petition, that since Jaistha 1393 B.S. the respondent stayed in her father's place and as such the petitioner could not detect earlier that she was in advanced stage of pregnancy and that the pregnancy was the outcome of illegal intercourse with someone else other than the petitioner. The petitioner accordingly prayed for decree of nullity of marriage u/s 12 of the Hindu Marriage Act, 1955. On the other hand, it is the case of the respondent-wife that prior to the marriage between the parties they had intimacy and taking that opportunity the petitioner used to visit the respondent's father's house at Chakta when they were known to each other through a relation and the petitioner and the respondent had the occasion of free mixing and had sexual enjoyment as a result of which the respondent became pregnant and ultimately when it Came to the knowledge of the parents of both the parties, the guardians of both sides arranged for their social marriage and after the marriage they lived as husband and wife arid enjoyed their marital life and the birth of the child took place in the matrimonial home at Malgram and after sometime she was sent to her father's place at Chakta for rest.

2. The learned trial court after considering the facts, circumstances and evidence on record came to the finding that the respondent-wife was made pregnant by the petitioner himself before their marriage and with full knowledge of the same the petitioner married her thereafter. The learned trial court came to the further conclusion on the basis of evidence on record that the marriage was not only consummated but even after knowing about the pregnancy they lived as husband and wife and accordingly the suit was even barred u/s 12(2)(b)(iii) of the Hindu Marriage Act. Accordingly the learned trial court dismissed the (sic). The appellant-husband has thereafter preferred the present appeal against such dismissal of the suit. The point for our consideration now is whether the learned trial court was justified in the dismissing the suit.

3. Before we discuss facts and evidence we would better take notice of the relevant provisions of Section 12 of the Hindu Marriage Act. 1955 as reproduced below:

Sec. 12. Voidable marriage - (1)"Any" marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree

of nullity on any of the following grounds, namely:

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage -

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied-

(i) that the petitioner was at the time of the marriage ignorant of the fact alleged;

(ii) that the proceedings have been Instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.

4. It is in evidence that the distance between the house of the petitioner and the house of the respondent's father is about 10 miles. It may be mentioned here that at the relevant time the father of the respondent-wife Sri Bhujanga Bhusan Chatterjee alias Shankar was an employee of Ara Colliery in the District of Hazaribagh Bihar and he used to live there with his brother and brother's wife leaving behind his family at his native village Chakta. Of course his eldest daughter Runu, the respondent used to live with him at Ara Colliery and she appeared in the School Final examination from there in March 1985 and then came back to Chakta from Hazaribagh and thereafter did not go back there. Even while staying at Ara Colliery she used to come occasionally during vacation to their native place at Chakta where her mother and other brothers and sisters used to live her father also used to visit their native out that she picked up acquaintance with her husband Subhendu Mishra in April 1985. She has her Pishima's house at Daskalgram. Presanta Mukherjee is the brother-in-law of her cousin brother Shyamal Banerjee (Pishtuto data). According to her evidence Shyamal Banerjee and Prosanta happened to be friends of her husband Subhendu. Prosanta she says was resident of Mirzapur near Bolpur. She says that after her Madhyamik examination, she went to her Pishima's house at Daskalgram and Prosanta brought Subhendu while she was there. We get it from her that the sisters of both Prosanta and Subhendu have the houses of their in-law's in the same village Belut. She says that she packed up acquaintance with Subhendu at Daskalgram and they met again at Shantiniketan where they stayed together. She further says that even before their marriage Subhendu used to visit their house at Chakta and they were almost like husband and wife and they had physical contact with each other, as a result of which she

conceived and this came to the notice of her parents as well as the parents of Subhendu and thereafter they arranged for marriage between them P.W. 1 Subhendu, the petitioner, is a primary school teacher. In his evidence he however says that he had no acquaintance with the respondent before marriage and he came to know her for the first time at the time of marriage. He says that the marriage was settled on the basis of the negotiation made by the father of the respondent and they all placed reliance on the statements made by her father. In his cross-examination he acknowledges that Prosanta Mukherjee is a resident of Mirzapur. He admits that his sister's house is at village Belut but he cannot say if Prosanta's sister's house is also in that village. It is suggested to him in his cross-examination on behalf of the respondent that before marriage the respondent stayed at the house of Shyamal, her cousin brother and at that time the petitioner also went there and had acquaintance with the respondent there through Prosanta. It has been further suggested to him in his cross-examination that on many occupations he had been to his in-law's house before marriage and had free mixing with the respondent and due to their voluntary sexual intercourse the respondent conceived and when that fact came to light the parents of (sic) arranged for their marriage to save their honour and prestige. P.W. 3 Biren Ghosh is a resident of Malgram and a friend of the petitioner Subhendu. He says that the marriage of Subhendu is a negotiated marriage and he with Subhendu's sister's husband went to village Chakta to see the bride and reported his impression to Subhendu after coming back in the first part of Baisakh and the marriage was held in Jaistha. On the other hand O.P.W.3 Kapil Banerjee is a resident of Daskalgram. The respondent is his cousin sister (Mamato bon). He says that during vacations the respondent used to come at Daskalgram as well as at Chakta. He further says that the petitioner Subhendu of Malgram visited their house and so he knew him. Prosanta of Mirzapur is the brother-in-law of Shyamal Banerjee who is the elder brother of O.P.W.3 Kapil Banerjee. According to his evidence, after her Madhyamik examination in 1985 when the respondent came to the house of the witness at Daskalgram, Subhendu also came there with Prosanta. He says that Mirzapur is adjacent to Bolpur and that at the time of Poush mela of Shantiniketan, Subhendu with Runu went to Mirzapur in the house of Prosanta. He also says that he found Subhendu and Runu mixing with each other as friends but he cannot say anything more since she was Runu's elder brother. He further says that Subhendu also used to visit Chakta and expressed to him his intention to marry her and requested him to offer this proposal to Runu's father and accordingly he carried that proposal to his maternal uncle, that is Runu's father stating that since they were close to each other that proposal might be accepted. He says that at that time Runu had been carrying. Then he speaks about the negotiation of the marriage and the holding of the marriage. He also says that at Belut village there are the houses of the in-law's of both Subhendu's sister and Prosanta's sister and between them there is relationship. In his cross-examination O.P.W.3 Kapil Banerjee says that the mixing of Runu with Subhendu sometimes appeared to him to be not tolerable and that was at the time of Poush mela at

Shantiniketan. O.P.W. 4 Bhujanga Bhusan Chatterjee alias Shankar Chatterjee is the father of the respondent. He says that the petitioner and the respondent had previous acquaintance with each other before marriage and in Chaitra. 1392 B.S. he came from his place of duty to his village and came to know that there was close relationship between Runu and Subhendu and for that she had become pregnant. O.P.W.5 Biswanath Saha is a resident of village Chakta. He says that he has seen several times Subhendu to come to their village Chakta at the house of Bhujanga Babu before his marriage with Runu.

5. At this stage we will rather look to certain letters which have been exhibited from either sides. Exhibit-1 is a letter written by the respondent's father to the petitioner from Ara Colliery on 9th October. 1986. It is an Inland letter. In this letter he expressed good wishes for Subhendu and the members of his family. Although there is nothing in that letter having a direct bearing on the issue involved in this case yet the father of the respondent in that letter appears to be rather apologetic for whatever reason might it be. But the other letter Exhibit 1-A which was written by the father of the respondent from Ara Colliery to his friend Hemanta Ghosh at Chakta is indeed sought to be used as a trump card by the petitioner. That letter is dated 28-8-86. It may be noted here that the respondent gave birth to the child on 22-2-86. In the said letter dated 28-8-86 the father of the respondent has indeed expressly written that he did not know that his daughter, the respondent was pregnant before marriage and that the petitioner is a good man and he should not have been made to suffer in this way. This letter clearly portrayed the picture that the respondent was made pregnant before her marriage by some one else other than the petitioner and he had all praise for the petitioner. Indeed this letter goes very much in support of the case of the petitioner that the respondent was made pregnant by some one else other than the petitioner before marriage and the petitioner knew nothing about this at the time of marriage. It is argued by the learned Advocate for the petitioner that in fact this letter clinches the issue and (sic) establishes case of the petitioner inasmuch as no father could have admitted so candidly the misdeed of his daughter unless the father was fully convinced about the truth of what he was admitting. This argument indeed appears to be faceful at the first blush. But when the matter is viewed in the background of a total perspective based on facts. (sic) and evidence on record it is bound to appear that this letter does not represent the correct state of affairs. And as a matter of fact this letter was written by the unfortunate father of the respondent to make an effect to satisfy the groom's side by clearing them of all blemish in the matter and taking the entire blame upon the bride with the sole expectation that thereby it might be possible to save the marriage when suddenly the groom's side wanted to break the relationship after the birth of the child. O.P.W.4 Bhujanga Bhusan the father of the respondent has clearly explained in his examination in chief that after sending the daughter from Malgram the petitioner's side started creating pressure on them by imputing false allegation about the character of his daughter and on the advise of

one Hemanta Ghose conveyed through his brother Ananta Chatterjee he wrote a letter acknowledging the guilt of his daughter with the hope as assured that normal relationship would be restored. If we believe his evidence we will find that the said letter was written by the father of the respondent to buy peace and save the marital relationship by taking the entire blame on his daughter and keeping the petitioner completely unblemished in the matter with the hope that thereby he would be able to get the (sic) of the groom's side and the marriage between the parties would be saved.

6. In this connection let us look to certain other letters which have been exhibited from the side of the respondent. As we have seen the marriage took place on 19-05-86 written by the petitioner to his father-in-law three days after returning to Malgram from Chakta. The petitioner recorded therein that his parents were very satisfied with the conduct of their daughter-in-law the respondent. Ext. B-3 is a letter dated 30-06-86 written by the petitioner to his sister-in law who is the sister of the respondent. This letter was written by the petitioner from Malgram after returning from Chakta. The letter expresses a very happy mood of the petitioner and his fondness for the members of his father-in-law's family. Ext. B-4 is a post card written by the petitioner from Malgram on 12-07-86 to his father-in-law at Ara Colliery. This letter also expresses a very happy mood of the petitioner and in this letter he has informed his father-in-law that on 15-07-86 (Tuesday) he would take admission in a ten-month course at Katwa Jr. Basic Training institute. He was seeking the blessings of his father-in-law. He also informed his father-in-law in that letter that on last Saturday he had gone to Chakta. Therefore it is evident that in or about the first week of July 1986 the petitioner had again gone to his father-in-law's house at Chakta where his wife was staying. Ext. B-1 is a post card written by the petitioner on 17-07-86 from Katwa Jr. Basic Training Institute to his mother-in-law at Chakta. In that letter also he was expressing due regards and love for all concerned in his father-in-law's house. He also informed by that letter that he had taken admission in the Katwa Jr. Basic Training Institute on 15-07-86. He also wrote in that letter that he would go to his house at Malgram on the next Saturday and also expressed his desire that Ranu the wife respondent would also definitely come to Malgram on that day. His eagerness to meet and join his wife on the ensuing Saturday at the matrimonial home is quite apparent in that letter and indeed quite natural too. This letter also indicates normal relationship and affinity between husband and wife enjoying healthy (sic) life. Ext. B-2 is an Inland letter written by the petitioner and the respondent jointly from Malgram on 11-8-86 to the father of the respondent at Ara Colliery. The first page of this Inland is the letter written by the petitioner to his father-in-law whereas the remaining part of the same Inland is the letter written by the respondent to her father. In that letter the respondent is informing her father that she has come to Malgram on 2nd (sic) (which will correspond) to 16th July. 1986 of so) In an earlier letter dated 12-7-86 we have seen the petitioner was writing to his mother-in-law that he would go to Malgram from

training Institute on the next Saturday and he was also expecting his wife in go there on that date. The letter dated 11-8-85 thus confirms that the respondent had come to Malgram from Chakta on or about the 16th July. 1986 and the petitioner and the respondent (sic) have enjoyed happy (sic) life at Malgram at that time when the petitioner also came there from the training institute and joined the respondent. Then on 11-8-86 we find the respondent and petitioner were writing letter in a (sic) Inland to the father of the respondent. That letter is also patency indicate of a happy (sic) life for the petitioner and the respondent. And we have seen that the respondent gave birth to the child on 22-8-86 that is only about 11 days after they (sic) that joint Inland letter from Malgram to the respondent's father. The respondent at that time was evidently in a very advanced stage of (sic). It is (sic) body's case that the respondent did not deliver a (sic) child on 22-8-86. The husband enjoying a happy conjugal life with his wife as has been indicated in the letter dated 11-8-86 written only 11 days before the wife delivered a mature child could not obviously be ignorant about the fact that his wife was in an advanced stage of pregnancy at that time. To say that the husband even at this stage, although enjoying a happy conjugal life with the wife, did not know that the wife was in a very advanced stage of pregnancy is to stultify commonsense and a husband enjoying a happy conjugal life for three months these the marriage with the unavoidable knowledge that his wife is pregnant at that time does not make any complaint and on the other hand both the husband and wife jointly write a common Inland letter with a very happy tone to the father of the wife. This can only happen, it is a commonsense view of the matter, only when the husband knows that he is the father of the child in the womb his wife and he must have known, he being an educated person, that this advanced stage of pregnancy was the sequel of conception caused by him much earlier to the marriage. Ext. A is a written paper which was signed by P.W. 5 Biswanath Saha. The contents of that document were admittedly written by the P.W. 1 Subhendu Mishra as it appears from his cross-examination. He also signed that document along with others. In that document it is recorded that Biswanath Saha of Chakta was taking the respondent with her new born baby from her father-in-law's house at Malgram to her father's house at Chakta on 30.8.86. The petitioner in his evidence tried to make out a case that the respondent gave birth to the child at village Chakta. He also tried to say in his examination in chief that on 7th Bhadra an information was sent to him that on 5th Bhadra the respondent had given birth to a male child at Chakta. Now 7th Bhadra corresponds to 24-8-86. We have seen in the document Ext. A that from the matrimonial home the respondent with her new born baby was taken to Chakta on 30-8-86 corresponding to 12th Bhadra 1393 B.S. We have also seen in the Inland letter jointly written by the petitioner and the respondent that she was in the matrimonial home definitely on 11-8-86. Can there be, therefore, any doubt about the fact that the birth of the child that took place on 22-8-86 must have happened at the matrimonial home at Malgram and not at Chakta? The answer cannot but be negative. In order to get rid of this incontinent truth, the petitioner took recourse to

falsehood in his cross-examination by saying that two days after delivery in his in-law's house wife came with the child at the matrimonial home and five days thereafter he sent her back with the child on 12th Bhadra 1393 B.S. But to P.W. 5 Biswanath Saha it is suggested on behalf of the petitioner in cross-examination that Biswanath came from Chakta with Runu and her child in his cart to Malgram and that when the petitioner and other members of his family refused entry he signed the paper Ext. A at the direction of the villagers. This suggestion on behalf of the petitioner to P.W. 5 is thus wholly inconsistent with the deposition of the petitioner that two days after delivery at Chakta the respondent came with the child and five days thereafter the petitioner sent her back with the child on 12th Bhadra 1393 B.S. It is the ease of the respondent which is substantiated by the P.W. 5 Biswanath Saha that Biswanath Saha came in his cart to the house of the father-in-law of the respondent at Malgram with Tathwa after birth of the child as per direction or the respondent's mother and Biswanath stayed in the house of the petitioner in that night and on the next day the respondent and her child were sent in his cart by the petitioner. Ext. C is the copy of the extract of register of births and deaths relating to the child which shows that the child was born on 22-8-86 and this information was registered with the Registrar of Births and Deaths Ketugram-1 (Burdwan) on 30-9-86. The name of the father of the child in that birth certificate is the name of the petitioner. The respondent's name has been recorded therein as the name of the mother of the child. The place of birth of the child has been recorded there Malgram. The petitioner Subhendu Mishra has been recorded as the informant and Tapan Bhattacharjee signed the same for Subhendu Mishra. This birth certificate wholly supports the case of the respondent that the respondent gave birth to the child on 22-8-86 in the house of the petitioner at Malgram. Petitioner also has been recorded as the father of that child. Tapan Bhattacharjee who has signed the relevant entries in the Birth Register on behalf of the informant Subhendu Marriage is none other than the husband of the elder sister of the petitioner, as we get from the evidence of the respondent. If the petitioner so desired he could have examined his own sister's husband Tapan Bhattacharjee to contradict or explain the information recorded in the said birth certificate purportingly at his instance through said Tapan Bhattacharjee. But he did not do so. Rather the petitioner himself says in evidence that he has taken a birth certificate of the son issued by the Kendra Family Planning office which he had filed in the suit. Be that as it may, in the absence of any fact or even any suggestion to the contrary it can be safely presumed that the "petitioner's sister's husband gave correct information to the Birth Registrar's Office regarding birth of the child of the petitioner and the respondent and also about associated facts like date and place of the birth.

7. We will also take notice of the evidence of Dr. DebiProsad Mukherjee who has been examined as court witness in this case. He is a Professor of Obstratics and Gynecology and has more than seventeen years of teaching experience. His evidence is that a woman in her first pregnancy, if properly dressed, can somehow

hide her pregnancy upto 32 weeks or 8 months but pregnancy cannot be hidden after 8 months. He further says that if the woman is undressed the husband can know of the pregnancy after 20 weeks and at the stage of 8 months everybody will detect pregnancy as the enlargement of the abdomen would be manifestly visible after 8 months and the size of the abdomen would change very little with the change of position, either erect or lying. He further says that if the delivery is on 22nd August and it is a normal delivery and not premature and the child survives, the pregnancy in mid-May of that year would be 26/27 weeks duration. He says that even a non-medical man inexperienced in sex life but educated, when comes in contact by acts of coitus for the first time with a woman running 26/27 weeks of pregnancy, would be able to feel that pregnancy and at any rate he must have some suspicion. We have seen from the facts, circumstance and evidence on record that the petitioner was enjoying a normal happy conjugal life with his wife, as expressed in various letters written by him, upto the delivery of the child at his house and that being so he must have been well aware about the pregnancy of his wife. But at any rate, before the birth of the child he did not express any dissatisfaction, suspicion or grievance in respect of the fidelity of the wife either pre-marital or post-marital. Such conduct of the husband is only consistent with the case of the respondent that the petitioner had pre-marital sexual relationship with the respondent even before they were formally married. We have also seen that the petitioner in his petition tried to project a case that the purported marriage had not been consummated and the respondent on one plea or other never allowed the petitioner to have access to her since Jaistha 1393 B.S. and she had been staying in her father's place since then, which however in view of the overwhelming facts, circumstance and evidence on record is found to be wholly untrue. If the marriage had not at all been consummated and the respondent never allowed access to the petitioner, in that event the petitioner would not have written any of the letters which we have already discussed and which reflects a very happy mood for the petitioner projecting a happy conjugal life. We are also convinced very much from the evidence on record as discussed that the petitioner picked up acquaintance with the respondent through Prosanta when the respondent had been at the house of her aunt (Pisima) at Daskalgram and thereafter he had been freely mixing with the respondent and visited her at Chakta in her father's house where she was staying. Having regard to the facts, circumstance and evidence on records we are fully convinced that the petitioner had access to the respondent even before their marriage at all material time including the time when the respondent conceived the child before marriage. In view of the fact that the child was born during the continuance of the marriage between the petitioner and the respondent and in view of our finding that the parties to the marriage are found to have had access to each other at the time when the child could have been begotten the presumption of legitimacy of the child u/s 112 of the Evidence Act is attracted having regard to the facts circumstance and evidence on record as discussed we are however clearly of the opinion that the conception of the child took place by reason of the premarital sexual relationship

between the parties as deposed by the respondent. Believing and accepting the evidence of the respondent herself we hold that apart from the legal presumption raised u/s 112 of the Evidence Act, even as a matter of fact the child was begotten by reason of voluntary pre-marital sexual relationship of the parties in this case. That being so we find no reason, to interfere with the decision of the learned trial court. The learned advocate for the appellant-petitioner referred to the decision of the Supreme Court in Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati, in support of his argument that since the child had been begotten admittedly sometime earlier than the marriage, the presumption of section-112 Evidence Act is not attracted. In our opinion, this argument is not tenable because in the cited decision it was found as a matter of fact that the husband had no access to the wife at the relevant time. Obviously if it is found that the conception took place before marriage and the husband had no access to the wife at that time there cannot be any question of any presumption u/s 112 Evidence Act. The situation in our case as we have found, is different. Here we have found in view of the facts circumstances and evidence on record that the petitioner had access to the respondent even at the time when the child was begotten before marriage. The decision of the Supreme Court in Baldev Raj Miglani Vs. Smt. Urmila Kumari, as cited by the learned Advocate for the appellant is also not applicable to the facts of our present case inasmuch as in the cited case it was not the plea of the wife that before marriage the husband had any sexual relationship with her and it was found that the wife was pregnant since long before the date of the wedding. In our present case however it is not in dispute that the conception of the child took place long before the marriage, but it is the respondent's specific case that such conception is the result of pre-marital sexual relationship Between the petitioner and the respondent which we have, as a matter of fact, found to be true on evidence. On the other hand the learned Advocate for the respondent referred to two decisions one being the decision of the Supreme Court in Smt. Dukhtar Jahan Vs. Mohammed Faroog, and the other the decision of the Privy Council in AIR 1934 49 (Privy Council) However for reasons elaborately discussed we have no reason to interfere with the decision of the learned trial court. The appeal is accordingly dismissed with cost.
Devendra Kumar Jain, J.

I agree.