

RAJASTHAN HIGH COURT

Shabnam

Vs.

Mohd.Shafiq

D.B. Civil Misc. Appeal No. 539 of 1996
(N.N. Mathur & K.K. Acharya, JJ.)

19.05.2004

JUDGMENT

N.N. Mathur, J.

1. This is plaintiff's appeal under Section 19 of the Family Court Act against the judgment dated 27.7.1996 whereby the Judge, Family Court, Jodhpur dismissed the appellant's petition for dissolution of marriage.
2. The facts giving rise to the instant appeal are that appellant filed a suit for dissolution of her marriage under Section 2(vii) of Dissolution of Muslim Marriage Act, 1939 on the ground that she was being married by her father before she attained the age of 15 years which was repudiated by her before attaining the age of eighteen years. She was aged 14 years at the time of *nikah* on 2.11.1991 performed through her father with Mohd. Shafiq. She disclosed her date of birth as 15.3.1978. It was further averred that marriage of the plaintiff was never consummated with defendant. She also claimed dowry as mentioned in Schedule 'A'.
3. The plaintiff's allegations were controverted by filing a written statement. In the written statement, it was admitted that *nikah* between the parties took place on 2.11.1991 but it was denied that plaintiff-Shabnam was 14 years of age at the time of *nikah*. It was stated that at the time of *nikah*, ShaharQaziShriAbid Ali filled in the proforma the age of plaintiff as 16 years. But, thereafter the father of the plaintiff with a view to file a suit, filed a false affidavit before the District Education Officer and could manage the change in date of birth. It was further averred that age of plaintiff in the school register of St. Don Bosco School, Jodhpur was 15.3.1975. It was also stated that in the school register of Kasturba Gandhi School, where the plaintiff was student of 2nd K.G., her date of birth was shown as 15.3.1975. It was further averred that in the Government

Girls' Senior Higher Secondary School, Sardarpura, Jodhpur, the original date of birth of plaintiff was recorded as 15.3.1975, but, after the orders of District Education Department, it was amended as 15.3.1978. This shows that age of plaintiff at the time of *nikah* was 16 years i.e. 2.11.1991. It was further averred that in the ration card, father of the plaintiff mentioned her age as 16 years. It was also stated that age of younger brother of plaintiff was inserted as 11.11.1976 in the school records. It was further averred that after the marriage, plaintiff came to her in-law's house and consummated the marriage for two days and third day she returned to her parents' house. Thereafter, she again visited her matrimonial home in the summer vacation and consummated the marriage. Defendant denied to have received notice to repudiate the marriage. With regard to Schedule 'A', it was submitted that plaintiff had already taken all the articles, therefore, she was in the possession of them. It was further averred that defendant has filed a petition for restoration of conjugal rights which was pending before the Bikaner Court. The plaintiff filed a rejoinder and denied that her date of birth was 15.3.1975 but it was re-emphasized that her date of birth was 15.3.1978. It was further averred that date of birth of Mohd. Afroz was 17.5.1980. In the rejoinder, she reiterated that she never consummated marriage with defendant.

4. On the basis of material controversy, Trial Court framed the following issues :-

- "1. Whether the marriage of the petitioner was solemnized before she attained 15 years of age and she repudiated the same before attaining her 18 years of age ?
2. Whether the petitioner ever discharged her conjugal duties after her marriage ?
3. Whether the petitioner is entitled to get articles mentioned in the annexed Schedule ?
4. Whether the petitioner has already received the articles mentioned in the enclosed Schedule ?

5. Relief ?"

5. Plaintiff examined herself as PW1 and her father Mohd. Ismail as PW2. Defendant examined himself as NAW-1, QaziMohd. Ayub as NAW-2, SalsarlSamyan as NAW-3, Om Prakash as NAW-4, Surajmal Pal as NAW-5, Anil Kumar as NAW-6, ShahrQaziAdique Ali as NAW-7, Mahajabin as NAW-8, Munni as NAW-9, Shauqat Ali as NAW-10 and Shyama Prasad Gaur as NAW-11. Plaintiff produced six

documents in support of her case. Defendant produced many as 50 documents. Trial Court decided all the issues in favour of the defendant and against the plaintiff and consequently dismissed the suit.

6. We have scanned, scrutinized and evaluated the entire evidence exhaustively and considered the rival contentions. Before proceeding to deal with the rival contentions, it would be appropriate to acquaint with the relevant provisions of Dissolution of Muslim Marriages Act, 1939 (hereinafter referred to as 'the Act of 1939'). The Act has been enacted to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. Section 2 of the Act of 1939 provides grounds for decree for dissolution of marriage which reads as follows:-

"2. Grounds for decree for dissolution of marriage. - A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely, -

- (i) that the whereabouts of the husband have not been known for a period of four years;
- (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
- (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
- (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- (v) that the husband was impotent at the time of the marriage and continues to be so;
- (vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- (vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years :

Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty that is to say -

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law :

Provided that -

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) before passing a decree on ground (v) the Court shall on application by the husband, make an order requiring the husband to satisfy the Court, within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."

7. Unlike, Hindu Law marriage under the Mohammedan Law is in the nature of contract. In the case of a minor who has not attained the age of puberty i.e. 15 years, the contract of marriage can be entered into by the Guardian of the minor but minor can always repudiate or ratify the contract made by her father during minority after the attainment of puberty. The minor on attaining puberty, may apply to the Court for dissolution of marriage on the ground as mentioned under Section 2 of the Act of 1939. Plaintiff is not promptly required to establish that she was minor at the time of

marriage but she has to further establish that marriage has not been consummated. Kerala High Court in *Kalluvalappil v. ParayangatVoorankutty* ¹has held that even after there was any cohabitation before she had attained puberty, it would not affect her right to repudiate the marriage which right she gets only after attaining puberty. The cohabitation by a minor girl would not be sufficient to put an end to her right to repudiate the marriage after attaining puberty. A husband cannot be allowed to contend that there was consummation of marriage even before the wife had attained puberty. The consent to intercourse by a girl who had not attained puberty is not of any consequence. But the position would be different if the marriage has been consummated after she had attained puberty. We are in complete agreement with the aforesaid proposition of law laid down by the Kerala High Court.

8. The Trial Court has not recorded the finding issue-wise as broadly two issues are involved in the instant case. Firstly, as to whether the plaintiff has succeeded in establishing that she was born on 15.3.1978 and not on 15.3.1975 and secondly, whether the marriage was consummated. As regards oral evidence, the plaintiff and the defendant in their statements have reiterated what they have averred in their respective plaint or written statement. Other witnesses have proved the documents produced by the parties. As far as the plaintiff is concerned, she has produced the certificate of Secondary School Exhibit P-1, date of birth certificate issued by Municipal Council Exhibit P- 2, marriage certificate duly corrected Exhibit P-3, date of birth certificate issued by Municipal Council in respect of Afroz Khan Exhibit P/4, marriage certificate Exhibit P/5 and list of dowry articles Schedule 'A' Exhibit P-6. Defendant has produced as many as 50 documents. All the documents are nothing but certificates obtained from different schools to show the date of birth of plaintiff. Whatever the date of birth which has been entered in one school, same has been carried out in different schools wherever the plaintiff studied and so as in the application form or the transfer certificate. Thus, the large number of documents produced by defendant only indicates the entry of date of birth at initial stage, has been restated in all subsequent documents. The Trial Court discarded the secondary school certificate Exhibit P-1 in preference of the other school certificates for the reason that it was on the basis of change made under the orders of Education Department dated 16.9.1993. Learned Trial Court discarded the certificate of Municipal Council as well on the ground that its basis was the information given by the father of the plaintiff. However, Trial Court accepted the date of birth of two brothers of plaintiff namely Mohd. Firoz and Mohd.Afroz as 11.11.1976 and 17.5.1978 respectively. According to the Trial Court, plaintiff being the elder sister

must have born prior to the birth of Mohd. Firoz i.e., 11.11.1976. Thus, in the opinion of the Trial Court by no stretch of imagination, it can be said that plaintiff was born in the year 1978 i.e. after the birth of her younger brothers.

9. It is submitted by the learned counsel that birth certificate has been issued by the Municipal Council under Section 12/17 of the Birth Death Registration Act which carries a presumption about its correctness. On the basis of the said certificate and affidavit of the plaintiff's father, the Education Department by order dated 16.9.1993 has accepted the prayer of the plaintiff and directed to correct the date of birth of plaintiff as 15.3.1978. So long that document has not been set aside by a competent authority or the Court, it is binding on one and all. All the school certificates from Exhibit A-1 to A-50 stands corrected in view of the order of Education Department dated 16.9.1993. There is also no reason to disbelieve the birth certificate issued by the Municipal Council. The certificate issued by the Municipal Council with respect to the date of birth of a person is a public document under the provisions of Sections 35 and 77 of the Evidence Act. It is an evidence of conclusive nature unless disproved. We are fortified in our view by the judgment of the Calcutta High Court in *Dalim Kumar Sain&Ors. v. Smt. NandaraniDassi&Anr.*, ²Said decision is based on the judgment of Patna High Court in *NanhakLal v. BaijnathAgarwala*, ³ Calcutta High Court has also referred to its earlier decision in *Anil Krishna Basak v. SailendraNath Paul*, ⁴Patna High Court in NanhakLal's case (supra), has held, thus :-

"A certificate of birth of a person is evidence and conclusive evidence of his age unless disproved by the evidence of the witness of the party denying the correctness of it."

10. The Apex Court in *Brij Mohan Singh v. Priya Brat NarainSinha&Ors.*, has observed as follows :-

"In actual life it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The Court of fact cannot ignore this fact while assessing the value of the entry and it would be improper for the Court to base any conclusion on the basis of the entry, when it is alleged that the entry was made upon false information supplied with the above motive."

11. The Apex Court again in *Birad Mal Singhvi v. AnandPurohit*, ⁶dealing with the entry relating to date of birth made in school register observed as follows :-

"An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

12. In the instant case, there is no material to show that on what basis plaintiff's date of birth was entered in the school records. If it could be on the basis of the information given her father, same stands corrected by the order of Education Department dated 16.9.1993. This finds corroboration from the date of birth certificate issued by the Municipal Council. As already stated, Birth and Death Certificate is statutory certificate. It being a public document, raises a statutory presumption of its correctness.

13. As regards the confusion about the date of birth of younger brother of plaintiff, Trial Court has not looked into the certificates Exhibit P-4 which shows that Afroz Khan was born in the year 1980. Thus, applying the preponderance of probability, we are of the view that plaintiff has succeeded in establishing that she was born on 15.3.1978, as such, she was minor on the date of marriage i.e. 2.11.1991. As regards, consummation of marriage, there is no reason to disbelieve the statement of plaintiff. She is the best witness to say if the marriage was consummated or not. She has stated in terms that marriage was never consummated. Be that as it may, even if the version of defendant that after the marriage on 2.11.1991, plaintiff stayed with him and the marriage was consummated, is accepted the plaintiff's date of birth being held to be 15.3.1978, on that date she was a minor. She attained the age of puberty on 15.3.1993. There is no evidence worth the name to show that marriage was consummated after her attaining the age of puberty. We may reiterate that cohabitation by a minor girl would not be sufficient to put an end to her right to repudiate the marriage after attaining puberty. The consent to intercourse by a girl who had not attained puberty is not of any consequence. There is no evidence to show that marriage was consummated after she had attained puberty i.e. after 15.3.1993. In fact in the year 1993 itself a notice to repudiate the marriage was given by the plaintiff and the suit of dissolution of marriage was filed in January, 1994. Thus, we hold that plaintiff succeeded in establishing that she was born on 15.3.1978, as such, she was minor on the date of marriage with the defendant-respondent-Mohd. Safiq on 2.11.1991. She repudiated the marriage by giving notice. The marriage was not consummated after she attained the age of puberty. Thus, the evidence on record fully satisfies the essential ingredients for dissolution of marriage on the ground under sub-clause (vii) of Section

2 of the Act of 1939. Trial Court has committed error in refusing to grant decree for dissolution of marriage in favor of the appellant. It is also significant to notice that respondent husband has contracted another marriage and is happily living with his second wife.

14. Consequently, the appeal is allowed. Order of Judge, Family Court, Jodhpur dated 27.7.1996 is quashed and set aside. Plaintiff-appellant-Mst. Shabnam's suit is decreed. Marriage between the plaintiff and defendant is dissolved. No order as to costs.

Appeal allowed.

Cases Referred.

1. (1988) 24 I.J. Reports 24, 361 at pp. 24, 362
2. AIR 1970 Cal 292
3. AIR 1935 Pat 474
4. (1965) 69 cal (WN) 593
5. AIR 1965 SC 282
6. AIR 1988 SC 1796