

# RAJASTHAN HIGH COURT

Mustafa

Vs.

Khursida

Civil Misc. Appeal No. 23 of 2005  
(Rajesh Balia and Dinesh Maheshwari, JJ.)

05.04.2005

## JUDGEMENT

**Maheshwari, J.**

1. The matter comes on an application filed by the appellant under Order 41 Rule 27 C. P. C. In the ordinary course, such application seeking production of additional evidence would have been considered by us only along with final hearing of the appeal. However, present one being an appeal arising out of matrimonial proceedings and as the appellant has prayed for production of the two documents as additional evidence and further be given opportunity to prove the documents, in the facts and circumstances of the case we have considered it appropriate to dispose of the application at the first.

2. This appeal has been filed by the appellant husband against the judgment and decree dated 6-11-2004 passed by the Judge, Family Court, Jodhpur in suit No. 106/2002 filed by the respondent Khursida on 6-5-2002. The respondent plaintiff alleged that her date of birth was 23-9-1985 and she was given in marriage on 15-10-1992 by her parents when she was 7 years 23 days of age. She claimed that she had never gone to her matrimonial house and that the marriage was never consummated and she had repudiated the marriage after attaining the age of 15 years and before attaining the age of 18 years.

3. From the consideration adopted by the learned Judge, Family Court, Jodhpur, it appears that the plaintiff produced the passport of her mother Husan Bano as Ex. 1, in which plaintiff's date of birth has been mentioned as 23-9-1985. She has also produced

birth certificate as Ex. 3 and the learned Judge, Family Court, relying upon these two documents, came to the conclusion that the plaintiff was married during minority and her date of birth was 23-9-1985.

4. The appellant-defendant alleged that in Nikahanama her date of birth has been entered as 13 years and she was about 20-21 years of age on 6-5-2002. The appellant also averred that the marriage has been consummated and the wife was not entitled to repudiate the marriage.

5. The learned Judge, Family Court has disbelieved that allegation of consummation of marriage with reference to the statement of the appellant himself who has admitted in his cross-examination that they never lived together as husband and wife and there was no cohabitation. It further appears from the grounds taken in the memo of appeal that during the trial of the suit, the appellant submitted an application seeking to produce certain documents which was rejected on 10-3-2004. The rejection was challenged in Writ Petition No. 1918/2004, however, the same was withdrawn on 14-4-2004 with liberty to assail the order in appeal. The appellant has made submissions in the memo of appeal to the effect that the probable date of birth of the plaintiff would be discernible from these documents namely, Nikahnama of Khus Nasim, the eldest sister of the respondent bearing her age 18 years on the date of marriage i.e. 16-10-1992 and Nikahnama of Najma Bano.

6. Without going into the aspects of presumptions and probabilities as raised in the memo of appeal at this stage, the documents which have been sought to be produced under Order 41, Rule 27, Civil Procedure Code may be referred. The appellant has submitted in the application that now he had been able to lay hands on certain documents i.e. certified copy of the voter-list of the year 2004 wherein age of the mother of the plaintiff Husan Bano has been shown to be 48 years and the age of Khursida has been shown to be 20 years to contend that on the day of presentation of the suit in the year 2002 she had already attained the age of 18 years. It has further been stated that now Kazi Maulana Saiyad Fida Rasool Barkati has given certificate that on the date of marriage, the father of the plaintiff stated her age to be 9 years and this document has been given on 8-2-2005 which becomes relevant document to decide the controversy.

7. Having examined the impugned judgment and decree passed by the learned Judge,

Family Court, Jodhpur, the grounds raised in the memo of appeal, the submissions made in the application under Order 41, Rule 27, Civil Procedure Code and so also the documents sought to be produced, we are satisfied that the application is totally devoid of substance and deserves to be rejected.

8. In the first place, it may be pointed out that the production of additional evidence in Appellate Court is not a matter of course and parties to appeal are not entitled to produce additional evidence in the Appellate Court unless it is shown that the lower Court has refused to admit the evidence which ought to have been admitted or that the party seeking production of the additional evidence establishes that despite due diligence it could not have been produced by him before the lower Court or when the Appellate Court requires the document to be produced to enable it to pronounce the judgment or for any other substantial cause. It is not a case where the two documents were sought to be produced before the Family Court and it refused to admit them. We are further satisfied that the documents are not such which could not have been produced by the appellant upon exercise of due diligence before the Family Court.

9. We have examined the documents also and in our opinion the documents in question are not even required for determination of any question involved in the case nor could be said to be of any worth as evidence on the disputed question of date of birth of the respondent plaintiff. Both the documents are not in the nature of primary evidence as the proof of date of birth and cannot even be used for establishing any remote connection with the subject matter of dispute about the date of birth of the respondent. The so-called Certificate issued by Kazi Maulana Saiyad Fida Rasool Barkati on 8-2-2005 is nothing but a remote hearsay evidence and therein also the said Imam has stated that no record of the said Nikahnama was kept. The voter list stating the age of 20 years of the respondent Khursida in the year 2004 does not even corroborate the vague allegation of the appellant that she was 20-21 years of age in the year 2002. In any case, the said document is also not a primary proof of the date of birth of the respondent-plaintiff. From the discussion on the evidence on record, it appears that the birth certificate of the plaintiff-respondent has been produced before the family Court which remains the primary proof of her date of birth. The presumption arising there from could be rebutted but the rebuttal has to come by way of direct evidence and cannot be deduced by reference to the two documents sought to be produced.

10. In this view of the matter, the application under Order 41, Rule 27 of the Civil

Procedure Code is rejected.

11. On 2-2-2005 the parties were directed to remain present and the record of the case was sent for. If the record has yet not been received, the same be sent for immediately and the case may be listed for final hearing on 12th May, 2005. The parties shall remain present on that date.

Application dismissed.