RAJASTHAN HIGH COURT

Mustafa

Vs.

Smt. Khursida

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

26.08.2005

JUDGMENT

Dinesh Mahesehwari, J.

1. This appeal under Section 19 of the Family Courts Act has been preferred by the husband Mustafa against the judgment and decree dated 6-11-2004 passed by the Judge, Family Court, Jodhpur in Civil Original Suit No. 106/2002, whereby the learned Judge accepted the petition for dissolution of marriage submitted by the wife-Khursida under the provisions of the Dissolution of Muslim Marriages Act, 1939 ('the Act of 1939' hereinafter).

2. Brief facts relevant for the present appeal are that the respondent submitted a petition before the Family Court, Jodhpur on 6-5-2002 seeking dissolution of her marriage with the appellant contracted by her parents on 15-10-1992 fundamentally on the ground that she was 7 years 23 days of age at the time of the marriage, her date of birth being 23rd September, 1985 which was also entered in the passport of her mother. According to the respondent, the marriage was never consummated and there was no cohabitation ever between the parties; that her Nikah with the appellant was carried out at the time when she was only 7 years of age (and had not even attained puberty). She claimed that she was now 17 years of age but has not reached 18 years of age; her Nikah was not with her independent consent and that the marriage between the parties was not of equal rank and was dis-advantageous to her future life and, therefore, she has not accepted this marriage and exercising the option of puberty (Khyar-ul-bulugh), she has repudiated the marriage and, therefore, the marriage between the parties deserves to be dissolved on account of this repudiation.

3. The petition was opposed by the appellant-husband controverting all the basic facts except marriage. The appellant denied that the wife Khursida was only 7 years and 23 days of age at the time of Nikah or that her date of birth was 23rd September, 1985. Entry of such date of birth in the passport of her mother was also denied. It was averred that the parties were professing the Muslim religion and the age of the party concerned is entered in Nikahnama at the time of the Nikah and so far remembered by him, in the Nikahnama his age was entered as 15 years and that of the respondent as 13 years but the Kazi concerned having been engaged by the applicant's party, was not delivering the copy of the Nikahnama. The mainstay of the averments of the appellant has been that although the respondent has come forward with the case of Khyar-ul-bulugh but the same was fundamentally incompetent for her having already crossed the age of 18 years at the time of filing of the petition.

4. The averments of the respondent-wife regarding the marriage having not been consummated and the parties having never cohabited have been denied with repeated assertions in paras 2, 5, 6 and the additional pleas para (ii) that the parties have, on many occasion cohabited and the marriage has been consummated. Regarding the question of her age, the appellant has submitted the averments of drawing inference from the age of the parents of the applicant and has attempted to calculate out the approximate age of all the issues of the parents of the applicant and by such work-out it has been suggested that in any case her (Khursida's) age was beyond 20 years at the time of filing of the petition. The reason for filing of the petition has also been stated in the manner that the daughter of the respondent's mother's sister (i.e. the cousin of the respondent) named Shamshad, was married to the brother of the appellant, (named Akbar, in the year 1986, but later on they parted ways and Talaq was obtained and, therefore, at the instance of her Aunt (i.e. the mother of Shamshad), the respondent was also not interested in maintaining the matrimony with the appellant. The appellant also made a counter-claim for restitution of conjugal rights.

5. On the pleadings of the parties, the learned Judge, Family Court, Jodhpur, in the first place framed only one contentious issue on the comprehensive question as to whether that at the time of Nikah with the consent of her parents, the applicant was only 7 years of age and that the marriage has not been consummated and the applicant has not attained the age of 18 years at the time of filing of the petition and, therefore,

whether she was entitled to the right of Khyar-ul-bulugh according to the Act of 1939 ? In the oral evidence, the applicant-respondent examined herself as PW-1 and her mother Husan Bano as PW-2, whereas non-applicant examined himself as NAW-1; his uncle Mohd. Saddiq as NAW-2; his other uncle Sakarrudin as NAW-3; and his mother Raisha as NAW-4.

6. It appears that the issue relating to the question of restitution of conjugal rights was not framed earlier but the same was framed only after the evidence of the parties was over and on this issue further evidence of the parties was taken for which the statements of the respondent Khursida have been recorded as AW-1 and of the appellant Mustafa as NAW-1.

7. In the documentary evidence a copy of the passport of the mother of the applicant has been produced as Ex.1A; a copy of the Ration Card with the applicant's father as the head of the family as Ex.2A; and a birth certificate of the applicant obtained on 7-2-2003 as Ex.3A.

8. After considering the entire material on record, the learned Judge, Family Court, Jodhpur has found on issue No. 1 that there was no reason to disbelieve the date of birth of the applicant as mentioned in her birth certificate and her same date of birth i.e. 23-9-1985 was mentioned in the passport of her mother and there was no reason to disbelieve the same either. Therefore, the applicant was married with the consent of her parents during her minority and has repudiated the marriage before attaining the age of 18 years and was, therefore, entitled to have the marriage dissolved. The basic contention raised by the appellant before the trial Court was that Khursida was 12 years of age at the time of Nikah and the material evidence of Nikahnama having been withheld, an adverse inference ought to have been drawn against her. Such a contention was rejected by the learned Judge for the reason that Nikahnama could be an evidence for the factum of Nikah only, but not for the date of birth as the Nikahnama could not contain the basis for recording the date of birth and when in relation to this fact, the relevant documentary evidence has been produced the Nikahnama was not required to be produced.

9. Another fundamental fact is required to be noticed that although in the reply to the petition, the appellant made repeated averments of the parties having consummated the marriage but in the statement before the Court, not only the applicant Khursida

was categorical about the non-consummation of the marriage, the appellant himself has categorically asserted in his examination-in-chief itself that he and the applicant never lived together as husband and wife and there had never been any cohabitation. This admission he has repeated in his cross-examination also. The learned Judge, Family Court, Jodhpur in view of the categoric admission of the appellant, discarded the testimony of NAW-2 Mohd. Saddiq who attempted to say that the parties lived together as husband and wife and who even attempted to assert that there had been cohabitation between the parties. After a thorough analysis of the entire evidence on record, the learned Judge, Family Court, Jodhpur decided issue No. 1 in favour of the applicant and with that decision the question of restitution of conjugal rights did not survive and, therefore, allowed the petition, decreed dissolution of the marriage and rejected the counter claim.

10. The appellant has assailed the judgment and decree passed by the learned Judge, Family Court, Jodhpur in this appeal again on the probabilities and has taken the ground that in the civil case the matter was required to be proved by probabilities and the core question was about the probable date of birth of the plaintiff-applicant and towards this, the age of the parents of the applicant-respondent and the age of the eldest issue born to them and the respective ages of their other issues would be relevant and, therefore, the trial Court was not right in rejecting the application seeking permission to take on record the Nikahnama of Khush Nasim, the eldest sister of the respondent bearing her age as 18 years on the date of marriage i.e. 16-10-1992 and that way the said Khush Nasim would be 29 years of the age and further the Nikahnama of one Nazma Bano which shows that she was also married on the same day. The birth certificate Ex.3A has been assailed on the ground that it was obtained only on 7-2-2003 and not immediately after the birth of the applicant. The truthfulness of the statement of the mother of the applicant has been assailed on the ground that she had given out her age to be about 42 years on the date of her statement on 4-7-2003 whereas her date of birth was recorded in the passport as 18-9-1956 which meant that at the time of her statement she was 47 years of age. Thereafter again with reference to the fact that there was a gap of two years between the issues begotten to the parents of the respondent, it has been sought to be deducted (deduced ?) that the respondent born as fifth issue would definitely have the age of not less than 21 years in the year 2003. The statement of the applicant before the Court regarding puberty has also been alleged to be totally wrong and, therefore, the entire evidence was required to be discarded. Further submission has been made that adverse inference

ought to have drawn for non-production of Nikahnama. The respondent has duly supported the judgment and decree passed by the Court below.

11. We may point out that in this appeal an application was submitted by the appellant under Order 41, Rule 27 of the Civil Procedure Code seeking to produce on record two documents one being the Voter List of the year 2004 wherein the age of the mother of the plaintiff-applicant Husan Bano has been shown to be 48 years and the age of the applicant Khursida has been shown to be 20 years to contend that on the date of the presentation of the petition for dissolution of marriage, Khursida has already attained the age of 18 years. It was further stated in the application that the Kazi has given certificate that on the date of marriage father of the applicant stated her age to be 9 years.

12. Having examined the impugned judgment and decree, the ground raised in the memo of appeal and so also the documents sought to be produced, we had rejected the said application by a detailed order dated 5-4-2005 and we found that the so-called certificate issued by Kazi Maulana Saiyad Fida Rasool Barkati on 8-2-2005 was nothing but remote hearsay evidence and therein also the said Imam has stated that no record of said Nikahnama was kept. The voter list stating the age of 20 years of respondent Khursida in the year 2004 does not even corroborate the vague allegation of the appellant that she was 20-21 of years of age in the year 2002. We found both the documents to be not in the primary proof of date of birth of the respondent. However, after rejecting the application under Order 41, Rule 27 of the Civil Procedure Code, we found that the parties were directed to remain present by an earlier order dated 2-2-2005 and accordingly they were directed to remain present on 12-5-2005 when the case was posted for hearing. Thereafter at least three attempts were made towards the efforts for reconciliation between the parties by holding conference with them jointly, independently and with the mothers of the respective parties and the lawyers representing them. However, no reconciliation came through and, therefore, we heard learned counsel for the parties on merits.

13. Having given our thoughtful consideration to the respective submissions and having examined the entire record of the case, we are satisfied that the learned Judge, Family Court, Jodhpur has not committed any illegality or error while passing the impugned decree dated 6-11-2004. The evidence on record has been analyzed and appreciated by the learned Judge in accordance with principles of law applicable to

the case and the conclusions reached by the learned Judge do not suffer from any perversity or illegality and the present appeal remains totally devoid of substance and deserves to be dismissed.

14. The Dissolution of Muslim Marriages Act, 1939 specifically deals with the provisions of Muslim Law relating to the rights of seeking dissolution of marriage by the woman married under Muslim Law and Section 2 thereof provides for certain grounds on which decree for dissolution of marriage could be obtained by a woman married under Muslim Law and the same, with Clause (vii) (omitting other clauses being irrelevant for the present purposes), reads thus, -

> "Section 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 :
>
> xxx xxx xxx
> xxx xxx xxx
> (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.
> xxx xxx xxx xxx"

15. In case of a girl married during her minority, she is entitled to the dissolution of marriage on her proving the facts to the effect that she was given in marriage by her father or other guardian and that the marriage took place before she attained the age of 15 years and that she repudiated the marriage before attaining the age of 18 years and that the marriage has not been consummated. Such right of repudiation, though mentioned by the parties and so also by the Family Court in issue No. 1 as Khyar-ul-bulugh, the option of puberty, needs a little clarification. Puberty specifically means, the earliest age at which a person is capable of begetting or bearing a child. In fact, this option of puberty, Khyar-ul-bulugh, as such was earlier not available outright when the minor was contracted in marriage by the father or grandfather and such contract was voidable at the option of minor on attaining puberty only when the father or grandfather has acted fraudulently or negligently or when the contract was to the manifest disadvantage of the minor, as explained by Mulla in Article 272 of Principles of Mahomedan Law (Nineteenth Edition, 1990 : Reprint 2003-page 234). The option

of puberty, Khyar-ul-bulugh that is, giving a blanket right to the minor to repudiate the marriage on attaining puberty was available only when the marriage was contracted for a minor by any guardian other than the father or the grandfather, as explained by Mulla in Article 274 (supra). However, by the Act of 1939, all restrictions on the option of puberty were abolished and instead, under Section 2(vii) of the Act, a wife when given in marriage by father or by any other guardian has been given the right to the dissolution of her marriage on proof of essential facts about the marriage having consummated, having taken place before her attaining the age of 15 years and her repudiating the marriage before attaining the age of 18 years. Therefore, the aspects of puberty as such are not directly relevant while dealing with this case under Section 2(vii) of the Act and it is the age at the time of marriage and at the time of repudiation, below 15 years and below 18 years respectively, that is decisive to consider validity of the option, of course with another decisive factor of non-consummation of marriage. We may also clarify that in this view of the matter, the grounds sought to be raised about the inferences about puberty of the respondent being wholly redundant and irrelevant would deserve no further consideration.

16. It is not in dispute in the present case that the date of Nikah is 15-10- 1992 and it is also not the case of appellant either that the applicant- respondent had attained the age of 15 years at the time of marriage when she was given in marriage by her father. Another fundamental fact that the marriage was never consummated remains undeniable with the appellant himself categorically admitting that they have never lived together as husband-wife and there had never been any cohabitation. The appellant and the respondent both are *ad idem* that they never cohabited. The statements of any other person to the contrary like that of NAW-2 Mohd. Saddiq on this fact is required to be rejected outright.

17. In the aforesaid view of the matter, the only contentious question remains about the age of applicant Khursida on the date of filing of the petition because she has asserted to have exercised her option before attaining the age of 18 years whereas the appellant has alleged that she had crossed 18 years of age at the time of filing of the petition and, therefore, had no right to exercise such option.

18. The applicant-respondent as well as her mother have categorically asserted the date of birth of the applicant to be 23-9-1985 and have produced the birth certificate Ex.3A and so also passport of the mother of the applicant Ex.1A, both of which

contain her date of birth as 23-9-1985 apart from ration card Ex.2A issued on 28-7-2001 recording the applicant's age as 16 years. In rebuttal thereof what the appellant has put forward are various probabilities which all are based on remote and irrational inferences and are nothing but baseless conjectures.

19. It is true that in the civil case, a relevant fact is considered on preponderance of probabilities also when there is no direct proof available but drawing of the inferences in the name of probabilities at such a conjectural level as suggested by the appellant is neither warranted nor could be approved by us. The appellant has attempted to contend that the age of the eldest sister of the applicant namely, Khush Nasim should be taken to be around 29 years and on that basis providing for a gap of two years in the birth of the next child, the applicant who is the fifth issue should be taken to be of 20-21 years of age. Such contentions are not even reasonable conjectures what to say of legal inferences. We may point out that in a desperate attempt to show the applicant to have crossed 18 years of age, the appellant, in the first place in his reply gave out her age at the time of marriage as 13 years and it was asserted to have been entered in Nikahnama. Going by that assertion her age would be 23 years at the time of filing of the petition. Then, during the course of evidence it was suggested that she was 12 years of age at the time of marriage. That would take her age to be about 22 years at the time of presentation of the petition. Then, the appellant in his examination-in-chief stated that her age was 10-12 years at the time of marriage. That would reduce her probable age to about 20 years at the time of the presentation of the application. Then Sakkruddin NAW-3 has stated that Khursida was the grand-daughter of his Aunt and at the time of filing of the suit, her age was 19-20 years and then the appellant has stated in his statement dated 11-10-2004 that Khursida was 19-20 years of age and her date of birth was not known to him and that she was 9-10 years of age at the time of Nikah. In view of such vacillating stand of the appellant regarding the crucial fact of the age and date of birth of applicant which has started with the assertion of her age at the time of filing of the petition as 23 years and which assertion has gradually gone down to 19 years, we have no hesitation in rejecting the conjectures suggested before us.

20. A suggestion was also made to draw adverse inference about non-production of Nikahnama. We are of opinion that any statement in Nikahnama would not have substituted the proof of date of birth. Moreover, the fact that there was no such Nikahnama has been admitted by the appellant's witness Mohd. Saddiq categorically

that Nikahnama was not issued because Khursida was minor. When Nikahnama was never issued, there could arise no question of drawing any adverse inference in relation thereto. Some discrepancy about the age of the mother of respondent with reference to her date of birth stated in passport has hardly any material bearing on the question of date of birth of the respondent.

21. Contrary to the unsure stand of the appellant, there is categoric evidence produced by the applicant. Even if the birth certificate Ex.3A is not taken into consideration for the same having been obtained only on 7-2-2003, we cannot lose sight of the passport of the mother of the applicant Ex.1A. This passport has been issued on 6-3-1992, that is, admittedly before the date of the marriage in question and in this passport the date of birth of applicant- respondent Khursida has been specifically stated as "23-9-1985." There is no reason to disbelieve the entry made in this passport which has definitely been issued even before the marriage in question and there is not even a remote suggestion that there could be any reason for the mother of the applicant to have not given the correct date of birth of the applicant in the said passport. The said entry is further corroborated by the Ration Card Ex.2A issued on 28-7-2001 in which also the age of applicant-respondent Khursida has been given as 16 years.

22. On the face of unsure and vacillating stand of the appellant, we find no reason to disbelieve the date of birth statement given out in the passport and we are clearly of opinion that the applicant has been able to establish that her date of birth was 23-9-1985 only and at the time when she was given in marriage on 15-10-1992 by her father, she was 7 years and 23 days of age and that she has lawfully exercised her right to repudiate the marriage as recognized by Section 2(vii) of the Act of 1939 before attaining the age of 18 years. She was 16 years, 7 months and 13 days of age on the date when petition seeking dissolution of marriage was presented to the Court and the option was clearly and openly exercised; and she was 16 years, 9 months and 23 days of age when the notice of the petition was served upon the appellant on 16-7-2002. We may point out that prior to that the notice was also offered to the appellant by the process server of the Court on 30-5-2002 which has been reported to have been refused. Be that as it may, the fact remains that the applicant has exercised the option of repudiating the marriage and the option was communicated to the appellant also before her attaining the age of 18 years. With the admitted case of the marriage having not been consummated, we are clearly of opinion that the learned Judge, Family Court. Jodhpur was right in accepting the petition and we have no hesitation in

upholding the judgment and decree dated 6-11-2004 dissolving the marriage between the parties.

23. The appeal fails and is dismissed. However, in the circumstances of the case, the parties are left to bear their own costs.
Appeal dismissed.