

RAJASTHAN HIGH COURT

Khatiza Tul Qubra

Vs.

Iqbal Mohd.

S.B. Civil Second Appeal No. 434 of 2007

(Dr. Vineet Kothari, J.)

27.01.2009

ORDER

Dr. Vineet Kothari, J.

1. With the consent of counsels, this second appeal is finally disposed of at admission stage. Following substantial questions of law as suggested in the memo of appeal are framed for consideration by this Court:

i) When the option of puberty is opted by a lady by her conduct and same is admitted by the opposite party, in that situation, whether it is necessary to obtain a decree for dissolution of marriage from a competent Court?

ii) Whether in the facts and circumstances of the present case, the suit for restitution of conjugal rights is maintainable?

iii) When the plaintiff himself admits that present appellant has entered into second marriage, then the decree for restitution of conjugal rights is justified or not?

iv) Whether the decree of restitution of conjugal rights can be executed when both the parties have remarried?

2. The plaintiff-husband Iqbal Mohd. filed a suit for restitution of conjugal rights in the trial Court with the averment that his marriage took place with the appellant wife Smt. Khatiza Tul Qubra d/o Mohd. Aslam Chhipa on 14-4-1984 according to Muslim Shariyat Law at Bhilwara and she was minor at the time of marriage and was contracted into marriage by her father with the plaintiff and upon attaining majority, she did not join matrimonial home of the plaintiff. Therefore, the plaintiff filed the present suit.

3. The defendant-wife filed written statement to the suit denying the factum of

marriage and submitted that she was only 7 years of age at the time of alleged marriage on 14-4-1984 and even if her father contracted her into marriage at the age of 7 years, she had repudiated the said marriage upon attaining the age of puberty of 15 years and has remarried with another person and since the marriage in question was never consummated with the plaintiff, she was not bound to go with him and so called marriage was void and repudiated and therefore, the suit deserves to be dismissed.

4. On behalf of the appellant-wife D. W. 1 Mohd. Aslam, father of the appellant-wife deposed before the trial Court that on 14-4-1984 when he contracted the marriage of the appellant with the plaintiff, she was only 7 years of age and she did not understand the meaning of marriage. She never lived with the plaintiff and the marriage was never consummated and the said marriage with the plaintiff was repudiated by her upon attaining the age of puberty i.e. 15 years. She had married with another person on 7-5-2000 and was living with her husband at *Kishangarh*.

5. On the basis of evidence, the learned trial Court deciding the said issue in favor of the defendant wife dismissed the suit of the plaintiff-husband. However, the first appeal filed by the plaintiff-husband before the appellate Court was allowed and the suit was decreed by the first appellate Court vide impugned judgment dated 6-9-2007 and the learned first appellate Court found that since the respondent did not obtain any decree from the Civil Court for dissolution of marriage under Section 2 of the Dissolution of Muslim Marriage Act, 1939, therefore, her first marriage with the plaintiff was valid as per Section 272 of the Muslim Law Shariyat and thus, the first appellate Court found that the defendant could not prove repudiation of her marriage with the plaintiff and thus decreed the suit.

6. Being aggrieved by the same, the defendant-wife has approached this Court by way of present second appeal under Section 100 C.P.C.

7. Mr. M. Siddiqui, learned counsel appearing for the appellant-wife submitted that it was not necessary for the appellant-wife to obtain any decree under Section 2 of the Act and exercising her right of "Khyar-Ut-Bulugh" (option of puberty), she had validly repudiated the marriage in question with the plaintiff and had got remarried and the trial Court had found in her favor about the said valid repudiation of marriage with the plaintiff which is alleged to have taken place on 14-4-1984 when she was only 7 years of age and the said marriage was never consummated and she never lived with the plaintiff. The learned counsel for the appellant-wife submitted that the first appellate Court had, without any valid reasons, reversed these findings of facts of the

learned trial Court which could not be said to be perverse in any manner as the requirement of repudiation even under Section 2 of the Dissolution of Muslim Marriages Act was proved by the father of the appellant-wife before the learned trial Court in his statement and, therefore, the suit was rightly dismissed by the learned trial Court and the first appellate Court could not decree the same. He submitted that the present second appeal deserves to be allowed and the judgment of the learned trial Court deserves to be restored.

8. The learned counsel for the appellant relied upon the Division Bench decision of this Court in the case of *Mustafa v. Smt. Khursida reported¹ in* and the judgment of Lahore High Court in the case of *Mohd. Baksh v. The Crown through Khuda Baksh reported in²*

9. On the other hand, Mr. Mukesh Patodia learned counsel appearing for the respondent-husband relied upon the decision of M.P. High Court in the case of *Piramohammad Kukaji v. The State of Madhya Pradesh reported³ in* and the decision of the Court in the case of *Sahnaz Bano (Smt.) and Ors. v. State of Rajasthan and another reported in⁴*. He also relied upon the provisions of Section 275 of the Muslim Shariyat Law.

10. Having heard the learned counsel and upon perusal of the judgments of two Courts below and the judgments cited at the Bar, this Court is of the opinion that the present second appeal of the appellant-wife deserves to be allowed and the impugned judgment of the first appellate Court dated 6-9-2007 deserves to be set aside and that of the trial Court dated 17-5-2006 deserves to be restored.

11. Firstly, a look into the relevant Sections of Mohammadan Law in this regard, namely, Sections 272, 273, 274 and 275 may be of relevance and therefore, they are quoted below:

"272. Marriage brought about by father or grandfather: - When a minor has been contracted in marriage by the father or father's father, the contract of marriage is valid and binding, and it cannot be annulled by the minor on attaining puberty. But where a father or father's father has acted fraudulently or negligently, as where the minor is a lunatic, or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining puberty.

273. Repudiation under the Dissolution of Muslim Marriage Act, 1939 :- By the Dissolution of Muslim Marriage Act, 1939 :- By the Dissolution of Muslim

Marriages Act, 1939, all restriction on the option of puberty in the case of minor girl whose marriage has been arranged by a father or grandfather has been abolished and under Section 2 (vii) of the Act a wife is entitled to the dissolution of her marriage if she proves the following facts, namely, (1) the marriage has not been consummated, (2) the marriage took place before she attained the age of 15 years, and (3) she has repudiated the marriage before attaining the age of 18 years.

274. Marriage brought about by other guardians:

Option of puberty - When a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining puberty. This is technically called the "option of puberty" (Khyar-ul-bulugh).

The right of repudiating the marriage is lost, in the case of a female, if after attaining puberty and after being informed of the marriage and of her right to repudiate it, she does not repudiate without unreasonable delay. The Dissolution of Muslim Marriages Act, 1939, however, gives her the right to repudiate the marriage before attaining the age of eighteen years, provided that the marriage has been consummated. But in the case of a male, the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation.

275. Effect of repudiation: - The mere exercise of the option of repudiation does not operate as a dissolution of the marriage. The repudiation must be confirmed by the Court. Until then the marriage subsists, and if either party to the marriage dies, the other will inherit from him or from her, as the case may be."

12. The Division Bench of this Court in the case of *Mustafa v. Smt. Khursida reported*⁵ *in* has held as under :

"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:

(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."

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 as 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 Mohamedan 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 1959, all restriction 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 not been consummated, having taken place before her 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 interference about puberty of the respondent being wholly redundant and irrelevant would deserve no further consideration."

13. The Lahore High Court in the case of *Mohd. Baksh v. The Crown through Khuda Baksh reported* ⁶ *in* has held as under :

"A marriage arranged by the father or the grandfather during a girl's minority stands on the same footing, as regards the option of puberty, as a marriage arranged by any other guardian. The mere fact that Section 2 of Act VIII (8) of 1939, gives a right to a girl in this position to obtain a decree for dissolution of marriage does not imply that apart from the provisions of Section 2, she has no right to exercise the option of puberty in such cases. A Court's order is not essential for conferring validity on the exercise of the option of puberty. The Court's order would seem to be only necessary to invest it with the judicial imprimatur in order to avoid any possible disputes. In any case, a declaration can be given by the Court itself even in the course of criminal proceedings initiated under Section 494, Penal Code to the effect that the first marriage stands dissolved by the option of puberty having been exercised."

14. On the other hand M.P. High Court in the case of *Piramohammad Kakaji v. The State of Madhya Pradesh* reported ⁷ in has held as under :

"Where a Muhammadan minor daughter's marriage is contracted by her father and not by any guardian other than the father, she has no right of repudiating the marriage on attaining puberty. Again the mere exercise of the option of repudiation does not operate as dissolution of the marriage. The repudiation is required to be confirmed by the Court. Even under the Dissolution of Muslim Marriages Act, 1939, a decree of the Court dissolving the marriage is necessary.

15. This Court in the case of *Sahanaz Bano (Smt.) arid Ors. v. State of Rajasthan and another* reported in ⁸ dealing with the matter under Section 482 Cr. P.C. observed about the requirement of Section 2 of the Dissolution of Muslim Marriage Act, 1939. In paras 5 and 8 of the judgment, this Court observed as under:

"In substance his argument is that dissolution of marriage by Qazi is valid. I am of the view that it is no so. The Dissolution of Muslim Marriage Act, 1939 enumerates grounds in Section 2 on which a woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage. The Dissolution of Muslim Marriage Act was passed when the ulema themselves recommended that the federal Government enact the Act of 1939 providing for nine grounds of divorce to a Muslim woman. It is an Act to consolidate and clarify the provision of Muslim Law relating to suits for dissolution of marriage by women under Muslim Law and to remove doubts as to the effect of renunciation of Islam by a married Muslim woman on her marriage tie. A Muslim woman has to obtain a decree of dissolution under this Act in case she

wants dissolution on anyone or more grounds enumerated in Section 2. Dissolution of a Muslim marriage can be done only by a competent civil Court on the grounds enumerated in Section 2 of the Act and not by Qazi appointed by Muslim Personal Law Board. Even if a Qazi is appointed under the Kazi's Act 1880, his appointment shall not be deemed to confer any judicial or administrative powers on him.

8. In this view of the matter when petitioner Sahnaz Bano was under a *bona fide* belief that Court of Qazi established by Muslim Personal Law Board was competent to grant her decree of dissolution of marriage, her *bona fide* belief shall be looked into by the Trial Court at the appropriate stage. But so far as order taking cognizance is concerned, the same cannot be quashed under Section 482 Cr. P.C."

16. In view of the aforesaid legal position and in view of the binding decision of the Division Bench of this Court (AIR 2006 Rajasthan 31) as well as decision of Lahore High Court, the view taken by M.P. High Court in Pira Mohammad Kukaji's case (AIR 1960 Madhya Pradesh 24) (supra) is not acceptable to this Court. This Court's decision in Sahnaz Bano's case (supra) is also distinguishable. It was a case under Section 482 Cr. P.C. and not about effect of absence of a decree for dissolution under Section 2 of the Act and the Court only held that dissolution could not be done by the Quazi appointed by the Board.

It is, thus, found here that it is not necessary for Muslim lady to obtain a decree for dissolution of her marriage after she exercises her option of puberty (Khyar-ul-Bulugh) upon attaining the age of puberty i.e. 15 years. If the factum of such revocation or exercise of option of puberty is proved before the trial Court even by the oral evidence and the trial Court returns the findings of facts in her favor in a suit filed by the husband, even then it should be sufficient satisfaction of requirement of Section 2 of the Dissolution of Muslim Marriages Act, 1939.

17. Section 275 of the Muslim Law quoted above also stipulates only this that repudiation must be confirmed by the Court. In the present case the findings of the learned trial Court that father of the appellant-wife had proved such repudiation of marriage with the plaintiff-husband is finding of fact and complies with the requirement of Section 275 of Muslim Law as well as Section 2 of the Dissolution of Muslim Marriage Act. Therefore, the said findings of facts unless found to be perverse could not be reversed by the first appellate Court. Requirement to obtain independent decree by the appellant-wife by approaching Civil Court is not the *sine qua non* of

law. Therefore, in the present case, the first appellate Court erred in reversing the finding merely on this ground and decreeing the suit for restitution of conjugal rights in favour of the plaintiff husband. Moreso, when admittedly, the appellant-wife had married another man way back on 17-5-2000 and ever since is living with her husband at Kishangarh, therefore, she cannot be asked to walk out of her valid marriage nor she can be forced to leave her peaceful matrimonial home now and abide by the decree in favor of the plaintiff-husband. After all we are dealing with human being in the present case and not a commodity or property. In the present case, the factum of her marriage with other person on 17-5-2000 was admitted by the plaintiff himself in the cross-examination, therefore, no decree of restriction of conjugal rights could be granted in his favor.

18. Consequently this Court is satisfied that the judgment of the first appellate Court dated 6-9-2007 is not sustainable and the same deserves to be set aside. Consequently, the present appeal of the appellant-wife is allowed and setting aside the judgment of the first appellate Court dated 6-9-2007, the judgment of the learned trial Court dated 17-5-2006 rejecting the suit of the plaintiff-husband is restored and it is held that the plaintiff-respondent Iqbal Mohd. Is not entitled to decree for restitution of conjugal rights against the appellant Smt. Khatiza Tul Qubra. All the four substantial questions of law framed above are answered in favor of the appellant-wife and against the plaintiff-husband. No order as to costs.

Appeal allowed.

Cases Referred.

1. 2006 WLC (UC) 450: (AIR 2006 Raj 31)
2. AIR 1950 Lah 133
3. AIR 1960 MP 24
4. 1999 (2) RCD 980 (Raj)
5. 2006 WLC (UC) 450: (AIR 2006 Raj31)
6. AIR 1950 Lah 133
7. AIR 1960 MP 24
8. 1999 (2) RCD 980 (Raj)