

Nizamuddin Vs. Huseni and ors.

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Court : Madhya Pradesh

Decided On : Jan-29-1960

Reported in : AIR1960MP212

Judge : Shiv Dayal, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 20 and 83; Muhammadan Law

Appeal No. : Second Appeal No. 34 of 1957

Appellant : Nizamuddin

Respondent : Huseni and ors.

Advocate for Def. : T.N. Saxena, Adv.

Advocate for Pet/Ap. : Mungre, Adv.

Judgement :

Shiv Dayal, J.

1. The appellant's suit for restitution of conjugal rights was decreed in his favour by the trial Judge, but it has been dismissed by the lower appellate Court on the ground that the marriage was not valid, that it was performed when the wife was only five years of age, that it was never consummated and that on attaining puberty the wife repudiated it. The defendants in the suit were Mst. Huseni the wife (defendant No. 1), her father Tunda (defendant No. 2). Mst. Shubratn mother (defendant No. 3) and her two uncles Subba (defendant No. 4) and Hallu (defendant No. 5).

2. The learned counsel for the respondent First of all urges that the suit could not be maintained because the plaintiff was a resident of Pakistan and he had come here just casually. Reliance is placed on *Nusserwarji Pestonji v. Eleonora Wadia*, AIR 1914 Bom 211(2). In my opinion, this contention cannot be accepted in view of Section 83 of the Code of Civil procedure, which enables an alien friend to institute suit in any Court as if he is a citizen of India. A resident of Pakistan cannot be said to be an alien enemy within the meaning of Section 83 as is clear from the explanation to that section. Pakistan government is not at war with India.

3. The next contention of the learned counsel for the respondents is that the suit could not be instituted in a Court at Gwalior. It is urged that a suit for restitution of conjugal rights can be instituted only at the place where the husband resides because it is there that the wife has to perform her marital obligations or at the place where the wife resides because of Section 20(a) of the Code of Civil Procedure. It is common

ground that the marriage between the plaintiff and Mst. Huseni respondent No. 1 took place at Lashkar. Now a Mohammedan marriage is not a sacrament, but a civil contract and a suit for restitution of conjugal rights is truly speaking a suit for enforcement of certain obligations arising out of that contract. That being so, such a suit can be instituted by virtue of Section 20(c) at any place where the cause of action wholly or partly arose. This is settled law that in a case arising out of a contract, a suit can be instituted at the place where the contract was entered into. The Court at Gwalior was, therefore, competent to try this suit.

4. This brings me to the merits of the case. There is no 'doubt that (1) Mst. Huseni was five years of age at the time of her marriage, (2) She never went to her husband Nizamuddin, that is the marriage was never consummated. (3) when a panchayat assembled she repudiated the marriage and at that time she had attained puberty; and (4) in her written statement also she repudiated the marriage.

5. Then again the law is settled that when a marriage is contracted for a minor by any guardian other than the father or father's father, the minor enjoys the option to repudiate the marriage on attaining puberty and this is technically called Khyarul bulugh (option of puberty) (See Muhammad Sharif v. Khuda Bakhsh, AIR 1936 Lah 683; Abdul Karim v. Aminabai, AIR 1935 Bom 308; Joygun Nessa Bibi v. Mahomed Ali Biswas, AIR 1938 Cal 71 and Ahmad Hussain v. Mt. Amir Bano, AIR 1940 All 63).

6. It is an admitted fact that at the time of her marriage her father and mother were both alive. If Mst. Huseni was given in marriage by the father, there can be no repudiation and this suit could not be resisted on that ground. She has not instituted any suit for dissolution of the marriage under the Dissolution of Muslim Marriages Act, 1939. If, however, it was her mother who had contracted her marriage with the plaintiff, she can successfully resist this suit having once repudiated the marriage. It has been held by my learned brother Khan J. as a Judge of the Madhya Bharat High Court that repudiation can effectively be made even in a suit for restitution of conjugal rights (see Batoolan v. Zahoor Shah AIR 1953 Madh B 30). With respect I agree with that view.

7. The whole case, therefore, turns on the Question whether Mst. Huseni was contracted in marriage with Nizamuddin by Tunda, her father, or by Mst. Shubratana, her mother. In view of the fact that in her written statement Huseni specifically alleged that it was her mother who had contracted her in marriage it was necessary that a specific issue on that question should have been framed. It seems to me that the significance of this question was not appreciated by the learned trial Judge. It is true that there was an omnibus issue No. 5. Whether the marriage of the plaintiff with the defendant was illegal? In my opinion, such an issue could not have focussed the attention of the parties on the crucial question, and in the interests of justice I think that the case must go back to the trial Judge for framing this issue and deciding the case afresh in the light of the above observations. I should, however, make it clear that no other issue shall be framed, nor shall the parties be allowed to lead evidence on any other question except this one.

8. The appeal is, therefore, allowed, the judgments and decrees of both the Courts below are set aside and the case is sent back to the trial Judge for framing a specific issue whether Mst. Huseni was contracted in marriage by her mother or by her father and then to decide the case afresh. Costs heretofore incurred shall be costs in the cause.

