

Calcutta High Court

Marfatali Mirja vs Jabedannessa Bibi W/O Marfatali ... on 17 December, 1940

Equivalent citations: AIR 1941 Cal 657

Author: B Mukherjea

JUDGMENT B.K. Mukherjea, J.

1. This is an appeal on behalf of the plaintiff and it arises out of a suit for restitution of conjugal rights. The plaintiff's case in substance was that defendant 1 was married to him about 7 or 8 years before when both of them were minors and their respective fathers acted as guardians for the marriage. It is said that the parties lived happily together for several years. Later on, defendant 1 fell ill, and being unable to perform her household and marital duties, herself requested the plaintiff to marry again. The plaintiff took another wife and defendant 1 although she regained her health went on staying in her father's place, and refused, at the instigation of her father, who was inimically disposed towards the plaintiff, to come over to her husband's place and live with him. The defence was that the marriage was never consummated and under the terms of the kabinnama which was executed at the time of the marriage, she was given the authority to divorce herself from the husband if the latter married again without her consent. As the husband did, in fact, take a second wife without her consent she exercised the power given to her by the kabinnama and the marriage was legally dissolved. Both the Courts below have decided the case in favour of the wife and (dismissed the plaintiff's suit.

2. The only point raised on behalf of the appellant is that as the husband was a minor at the time of the marriage, neither he nor anybody else on his behalf had any right to delegate to the wife the authority to effect a divorce. No authority is cited in support of this proposition, but it is argued that it is deducible from certain well established principles of Mahomedan law, according to which a minor cannot exercise the power of divorcing his wife, and the guardian for marriage, even if he is the father, has no authority on behalf of the infant husband to enter into any agreement which he is not expressly permitted to do by Mahomedan law. I do not think that I can accept these contentions as sound. Under Mahomedan law, a person cannot contract a marriage unless he or she is of sound mind and has attained puberty. But even if the parties are minors, consent on his or her behalf can be expressed by the guardian for marriage who is legally authorized to make a valid contract of marriage. If the guardian suffers from no disability himself and is entitled to act as such according to the rules of precedence recognized by Muslim jurists, a juridical act performed by him has, in my opinion, all the legal consequences as if the act was done by the principal. Exceptions by way of giving an option to repudiate the marriage when the parties arrive at majority are recognized only in cases where the guardian does not belong to a particular group or when the marriage is negligently or fraudulently contracted. (Ammer Ali's Mahomedan Law, vol. 2, page 370, Edn. 5). But barring these exceptions, the legal results of a marriage contracted through a proper guardian must be the same as when the parties make the contract themselves.

3. Apart from the provisions relating to divorce, maintenance, iddat, et cetera, there are other rights and obligations arising between husband and wife by virtue of the agreement entered into at the time of the marriage, and provided the terms of such contract are not incompatible with any rule or policy of Mahomedan law, they, in my opinion, are enforceable in a Court of law. I do not agree with

the learned advocate for the appellant that it is necessary that there should be a special text authorizing the guardian to enter into a contract on behalf of the minor husband relating to divorce. It is enough that there is no prohibition. It is conceded that the stipulation in the present case does not contravene any principle of Mahomedan law. I think the decision of the Court below is right and this appeal should be dismissed. I make no order as to costs.