APPELLATE CIVIL.

Before Mukherjea J.

ABUAL KASEM

v.

JAMILA KHATUN.*

1940

Jan. 8, 9.

Mahomedan Law—*Marriage of minor.*

The rule of Mahomedan law that when a guardian more remote marries a boy or girl when the nearer one is present the validity of the marriage is dependent upon the latter's ratification has no application to a case where, as between the nearer guardian and the one who actually disposes of the minor in marriage, there are other relations who have preferential rights of guardianship.

Where the marriage of a minor is contracted by a remoter guardian and the nearer guardian who is present does not give his consent, the marriage is void and not merely invalid or voidable.

Muhammad Sharif v. Khuda Bakhsh (1) dissented from.

APPEAL FROM APPELLATE DECREE preferred by the plaintiff.

The plaintiff claimed to be the husband of defendant No. 1 and sued *inter alia* for the restitution of conjugal rights. The defendant pleaded that there was no marriage contracted and, in the alternative, if there had been a marriage, she was a minor at that time and that she repudiated the marriage on attaining puberty. The learned Munsif held that there was in fact a marriage, but that such marriage was void *ab initio* and dismissed the suit. On appeal, the District Judge upheld the decision of the lower Court.

*Appeal from Appellate Decree No. 66 of 1938 against the decree of S. K. Chatterji, Additional District Judge of Zilla Tippera at Comilla dated June 19, 1937, affirming decree of Himangshu Bikash Basu, Munsif, Second Court, Comilla, dated Feb. 2, 1937.

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The facts of the case appear more fully from the judgment.

Phani Bhusan Chakravartti for the appellant. Since the legal guardian was present at the marriage ceremony and gave his consent to it, the fact that the respondent was a minor and was given in marriage by the maternal uncle does not make the marriage void. (*Vide* Baillie's Digest of Mahomedan Law, p. 49.) At the most the marriage was invalid and the wife could repudiate the marriage on attaining puberty *vide* Mahomed Yusoof's Tagore Law Lectures on Mahomedan Law of Marriage and Divorce and *Muhammad Sharif* v. *Khuda Bakhsh* (1). Such right of repudiation is not subsisting, as there has been consummation of the marriage.

Amiruddin Ahmad for the respondent. In the plaint, the plaintiff relied on the respondent being a major at the time of marriage, but documents proved otherwise. In the circumstances, he ought not to be allowed to make an alternative case. In any event there is no evidence that either the paternal uncle or the mother of the minor consented to the marriage.

Although *khiyâr-ul-bulugh* gives a Mahomedan woman right to validate an otherwise invalid marriage, it does not make the invalid marriage voidable. This right of the woman is merely that of choosing her husband and not that of curing any defect in any invalid contract.

Under the Mahomedan law, a *fâsid* marriage should be disallowed even if consummation has taken place (Baillie's Digest, p. 156). In this respect there is really no difference between a *fâsid* and a *bâtil* marriage, the distinction is useful only for purposes of the punishment prescribed by the Mahomedan criminal law. (Fatawa-i Alamgiri, Vol. II.) The case cited by the plaintiff is not applicable.

Chakravartti, in reply.

Cur. adv. vult.

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MUKHERJEA J. This is an appeal on behalf of the plaintiff husband and is directed against a decree of dismissal in a suit for restitution of conjugal rights. The plaintiff's case is that he was married to defendant No. 1 in due form as prescribed by Mahomedan law on February 14, 1926. He lived with her as hubsand and wife in the house of the wife's mother for a period of ten years after marriage. Subsequently, he set up a house of his own and when he went to bring his wife to his place sometime in Chaitra, 1342 B.S., he was obstructed in so doing by defendant No. 2 and also by other defendants who are her relations. The plaintiff, thereupon, commenced this present suit and he prayed for restitution of conjugal rights as well as for a permanent injunction restraining the defendants other than the wife from interfering with the wife's discharge of her marital duties.

The suit was resisted by the wife alone whose defence was that he was never married to the wife and if there was any marriage, it was repudiated by her on attaining puberty.

The trial Court held on the evidence that there was a ceremony of marriage gone through between the parties on February 14, 1926, but defendant No. 1 was a minor at that time and she was contracted in marriage by her maternal uncle, Daulat Hazi, who could not be a proper guardian for purposes of marriage according to the Mahomedan law. The Munsif, accordingly, held that the marriage was void *ab initio* and dismissed the plaintiff's suit. This decision was affirmed by the Additional District Judge of Tippera on appeal.

Mr. Chakravartti, who appears on behalf of the plaintiff appellant, has raised two points before me in support of the appeal. In the first place, he has argued that, assuming that defendant No. 1 was a minor and was given in marriage by the maternal

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uncle, Daulat Hazi, who was a remoter guardian according to the Mahomedan law, yet the marriage was validated by reason of the fact that Karimuddin, the paternal uncle of the girl, who was the rightful guardian at that time, was actually present during the ceremony and gave his express consent to it.

His second point is that, in any view of the case, the marriage was voidable and not void and all that the wife could do was to repudiate the marriage on attaining puberty. This right, it is urged, has now been lost as on the evidence in the record the marriage was consummated.

Now, as regards the first point, the rule of Mahomedan law undoubtedly is that, when a guardian more remote marries a boy or girl when the nearer one is present, the validity of marriage is dependent upon the latter's ratification and consent. (*Vide* Baillie's Digest of Mahomedan Law, p. 49.)

The contention, however, does not seem to me to assist the plaintiff in the present case. There is no convincing evidence, in my opinion, to show that Karimuddin who was the legal guardian expressly ratified the marriage. The plaintiff no doubt says that Karim was present all along with other people at the time of the marriage and agreed to it; but he says at the same time that the wife was a major and herself gave her consent. The last part of the story has been disbelieved by both the Courts below and, in the absence of any corroborative evidence, I am unable to believe the earlier part. Plaintiff's witness No. 2 speaks of the presence of Karimuddin at the *majlish*, but he does not say that Karimuddin actually gave his consent. All the other witnesses, who were examined for the plaintiff, speak of the girl being a major at the time and giving consent herself and none of them says that there was any guardian acting on her behalf in the marriage ceremonies. Karimuddin is admittedly dead and Daulat, who, according to the *kâbinnâmâ*, acted as the guardian, has not

been examined by either side. It appears further to me that the rule of Mahomedan law laid down above contemplates a case where the boy or girl is given in marriage by a person, who, in order of priority, comes immediately after the proper guardian at that time. In fact, the consent of the nearer guardian may have the effect of transferring the authority to the remoter guardian and exactly the same thing happens when the nearer guardian resides at a distance and no communication is possible with him. This rule cannot apply, in my opinion, to a case, where, as between the nearer guardian and the one who actually disposes of the minor in marriage, there are other relations who have preferential rights to guardianship. In the present case, Daulat Hazi does not come immediately after Karimuddin and the mother has certainly precedence over him. I do not believe that the mother was present at the time of the marriage and gave her consent. Under these circumstances, the first point raised by Mr. Chakravartti must fail.

The next point for consideration is as to what the legal consequences would be when a marriage is contracted on behalf of a minor by a remoter guardian, when the nearer guardian is present and has not given his consent. Mr. Chakravartti argues that such marriages are invalid and not void and the only consequence would be to allow the party an opportunity to repudiate the marriage when he or she attains majority.

There is undoubtedly such a thing as an invalid marriage in Mahomedan law as distinguished from a void marriage. Baillie in his book on Mahomedan law has devoted one chapter to the discussion of this topic. But the learned author has nowhere formulated the test for distinguishing an invalid marriage from a void marriage nor has he given an exhaustive list of invalid marriages. The instances cited by

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him relate to cases where no witnesses are present at the time of the marriage or when the marriage is one with the various kinds of *mooharim* or prohibited women. A marriage, according to Mahomedan law, is a contract pure and simple, and understanding and puberty on the part of the contracting parties are essential. If a girl has not attained puberty and the person, who contracted on her behalf, has no legal authority to do so according to Mahomedan law, I am inclined to think that one of the essential conditions of a legal marriage is wanting and the marriage must be regarded as void *ab initio*. Mr. Chakravartti has referred me in support of his argument to two passages in Mahomed Yusoof's Tagore Lectures on Mahomedan Law of Marriage and Divorce, and a decision of the Lahore High Court: *Muhammad Sharif* v. *Khuda Bakhsh* (1).

The first passage in the Tagore Lectures upon which reliance has been placed reads as follows:—

> And if she (a virgin) has been given in marriage by a distant guardian (that is, when a nearer guardian is present) and she comes to know of the marriage, and keeps quiet, then her silence will not amount to consent, when the near guardian is not absent in a way so that his absence might be called *Ghybut Moonkutaia* ..... (Vol. II, p. 54).

It appears from the context that the author was discussing here the circumstances under which the silence of a woman (not necessarily a minor) might amount to consent and, in his opinion, if the nearer guardian was present and the girl was given away in marriage by a remoter guardian, the silence of the girl would not amount to consent. If this rule is applied, we have got to hold that the silence of the girl, if any, in the present case would not amount to consent, as Karimuddin the nearer guardian was not absent and communication with him was not impossible. This passage, however, nowhere says that when a remoter guardian contracts a girl in

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marriage in the presence of the nearer one, the marriage is invalid and not void. The other passage referred to by Mr. Chakravartti occurs at p. 57 of the same volume and runs as follows :—

> If a minor boy or girl should marry himself or herself without the permission of the guardian, and then they attain majority, the marriage contracted by them is not vaild unless they ratify the same after attaining majority.

This passage would seem to suggest that express ratification of the parties, after they had attained majority, is essential for the purpose of validating the marriage which was contracted by the minors themselves without the permission of any guardian. This cannot certainly assist Mr. Chakravartti's client in the present case, as it is nobody's case that there was express ratification by the girl after she attained majority.

The decision in the Lahore case mentioned above undoubtedly lends some support to Mr. Chakravartti's contention. There, however, the point was not expressly decided, but was rather conceded by both parties and the learned Judge was of opinion that, when a minor girl was given in marriage by a remoter guardian in the presence of a nearer one, it was not void but only invalid in the sense that the girl was at liberty to exercise her option of repudiation after attaining majority. No reasons are given in the judgment and no authority is cited. I regret I cannot accept this as an authority binding upon me and laying down a proposition of law that, in a case like this, when the girl was a minor and was given in marriage by a person who was not competent to act as guardian under the Mahomedan law, the marriage is only invalid and not void. Even if I assume that the marriage was invalid and not void, the legal consequences would be that it could be terminated by a single declaration on either side. As Baillie lays down in his treatise on Mahomedan law :—

> When an invalid marriage has taken place, it is the duty of the judge to separate the parties; and if the wife be unenjoyed she has no claim to dower,

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but otherwise she is entitled to whichever may be the less—of her proper dower, and the dower specified ..... (*vide* Digest p. 156).

This shows clearly that consummation of marriage does not stand in the way of terminating it when the marriage is invalid according to Mahomedan law and the woman would be entitled to dower only when the marriage is consummated and not otherwise. It is not, however, necessary for me to pursue the matter further, as, in my opinion, the marriage here was void and not voidable.

The result, therefore, is that I affirm the decision of the Courts below and dismiss this appeal.

There will be no order as to costs in this appeal.

Appeal dismissed.

S. M.