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KISHAN SINGH v. THE KING-EMPEROR

Their Lordships are of opinion that this case comes within the exception to the rule stated in the judgement of Lord WATSON in *In re Dillet* (1).

This appeal, therefore, should be allowed, the judgement and order of the High Court should be set aside, and the judgement and order of the learned Additional Sessions Judge should be restored, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitor for respondent: *Solicitor, India Office.*

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Banerji.

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February 24

SIBT AHMAD AND ANOTHER (DEFENDANTS) *v.* AMINA KHATUN (PLAINTIFF)*

Muhammadan law—Shias—*Marriage*—Shia *girl married to a* Sunni—*Consent of bride*—*Presumption as to age of puberty*—*Guardian* ad litem—*Costs.*

According to the Muhammadan law applicable to the *Shia* sect, a girl is of full age when she attains the age of puberty, and, in the absence of direct evidence, there is a presumption that that event would occur between the ages of nine and ten years.

Where, therefore, a *Shia* girl of the age of nearly thirteen years was married, with the consent of her father, but without her own, to a boy who was a *Sunni*, and, before she attained the age of twenty-one years, she sued to have the marriage declared illegal and not binding on her, it was *held* that she was entitled to the decree asked for: the consent of the father could not in the circumstances take the place of the consent of the girl herself. *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan* (2), followed.

* First Appeal No. 497 of 1926, from a decree of Iftikhar Husain, Subordinate Judge of Budaun, dated the 12th of July, 1926.

(1) (1887) 12 App. Cas. 459 (467. (2) (1873) 26 W. R. (C. R.), 26.

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There is no authority in the Code of Civil Procedure to award costs personally against a guardian *ad litem*. *Narasimha Rau* v. *Lakhsmipati Rau* (1), followed.

THE facts of this case are fully stated in the judgement of the Court.

Mr. *R. S. Pandit* and Munshi *Sarkar Bahadur Johari*, for the appellants.

Mr. *A. M. Khwaja*, Mr. *T. A. K. Sherwani* and Mr. *Mahmud-ullah*, for the respondent.

LINDSAY and BANERJI, JJ. :—The suit which has given rise to this appeal was brought by a Muhammadan lady, Bibi Amina Khatun, in order to obtain a declaration that a ceremony of *nikah* which is said to have taken place on the 22nd of September, 1917, between her and the first defendant, Sibt Ahmad, was not lawful and binding and that the relation of husband and wife did not exist between the first defendant and herself.

The first defendant, Sibt Ahmad, was impleaded as a minor under the guardianship of his grandfather, Wazir Ahmad.

The second defendant impleaded in the suit was Maulvi Qasim Hasan, who is the father of the plaintiff. He was a *pro formâ* defendant.

In substance the defence to the suit was that the ceremony of *nikah* which had taken place between the plaintiff and the first defendant was a valid ceremony, and that the plaintiff was not entitled to the declaration sought. The Subordinate Judge gave a decree in favour of the plaintiff.

Before we go on to discuss the issues which have to be determined in this appeal, we think it proper to say something of the history of the family to which the parties belong.

Wazir Ahmad, who appears in this litigation as the guardian *ad litem* of the minor defendant Sibt Ahmad,

(1) (1881) I. L. R. 3 Mad., 263.

had two sons, Qasim Hasan the elder, who is the father of the plaintiff, and Ibn Ahmad, the younger, who is now dead. It is admitted that the plaintiff, Amina Khatun, was born on the 24th of November, 1904, and consequently at the time this *nikah* took place in September, 1917, she was close on 13 years of age. Amina Khatun had a brother named Abdul Hafiz who is said to have died in or about the year 1919 or 1920.

It is admitted that before September, 1917, Wazir Ahmad had totally disinherited his son Qasim Hasan, the father of the plaintiff, by making a gift of all his property to his younger son Ibn Ahmad. According to what is set out in the written statement this gift was made because Wazir Ahmad was displeased with what is called the "misconduct and highhandedness" of his elder son. We have no particulars of this misconduct, but we can have little doubt after a perusal of the oral and documentary evidence in this case that Wazir Ahmad was led principally to execute this deed of gift because his son Qasim Hasan was married to a *Shia* lady. Wazir Ahmad himself is a rigid *Sunni* to whom the *Shia* creed is obviously abhorrent. This is made plain from some of the correspondence on record. It is also equally clear that Qasim Hasan's wife, Musammat Ashraf Bano, is a staunch *Shia* and that she and her father-in-law have never been on good terms.

We have also proof upon the record that Wazir Ahmad was anxious about the faith of the two children of Qasim Hasan. There can, we think, be no doubt that it was his desire that they should be brought up as *Sunnis*. Abdul Hafiz, the son of Qasim Hasan, disappointed this hope, declaring himself to be a *Shia* some time in 1916 or 1917, at a time while his father Qasim Hasan was employed as a Deputy Collector at Fyzabad.

Having totally deprived Qasim Hasan of his right to inherit any of his property, it seems to have occurred to

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Wazir Ahmad to repair what he had done by arranging two marriages, namely, one between the plaintiff and Sibt Ahmad, the son of Ibn Ahmad, and the other between Qasim Hasan's son, Abdul Hafiz, and Musammat Zohra, the daughter of Ibn Ahmad, and there can be no doubt that proposals to this effect were made both to Qasim Hasan and to Ibn Ahmad. Certain correspondence which is on the record, bearing date June, 1917, shows how these negotiations went on and shows that at that time Qasim Hasan was most unwilling to give his daughter in marriage to Sibt Ahmad; it further appears that his wife was very strongly opposed to any such union.

Qasim Hasan has been examined in this case, and from his own statement and from what appears from the letters which were written by him he was evidently between two fires at the time mentioned above. He was, we think, anxious about the property, that is to say, he wanted, if he could, to put his children in the way of succeeding to some of the property which had been gifted away by Wazir Ahmad to his younger son, Ibn Ahmad. On the other hand, his letters disclose that he was anxious for the happiness of his daughter. One objection which he had to the marriage was on the ground of disparity of age. He pointed out that the girl was between 5 and 6 years older than Sibt Ahmad.

However reluctant Qasim Hasan was in June, 1917, to allow a marriage to take place between his daughter and the first defendant, it appears that before the month of September, 1917, he was won over by the solicitations of his father and became willing to allow the double marriage to take place, that is to say, the marriage between the plaintiff and Sibt Ahmad and the other marriage between his son Abdul Hafiz and the daughter of Ibn Ahmad, called Musammat Zohra. The result of all

this was that in September, 1917, the two brothers, Qasim Hasan and Ibn Ahmad, with their families proceeded to the family house at Budaun where they arrived on the 22nd of September. On the night following their arrival, that is to say, the 23rd (not the 22nd as stated in the pleadings) a ceremony of *nikah* was performed as between the plaintiff Amina Khatun and Sibt Ahmad. The other proposed *nikah*, for which also preparations seem to have been made at the same time, was put off on the allegation that Abdul Hafiz was then not of sufficiently good character.

[After further consideration of the circumstances of the family and the religion to which Amina Khatun, the plaintiff, belonged at the time of the *nikah* ceremony in September, 1917, the judgement continued :—]

Having considered the circumstances of the case and the probabilities we are of opinion that the Subordinate Judge was entitled to find that the plaintiff was a *Shia* before the *nikah*. We have no doubt that the Subordinate Judge's finding on this matter is correct.

We have, therefore, to apply the *Shia* law in order to ascertain whether this ceremony of marriage, which was performed in September, 1917, is binding on the plaintiff. That the ceremony was performed is a matter which is not denied.

The next matter to be determined is whether at the time of the *nikah* the girl was of full age, that is to say, had she attained the age of puberty, and if she had attained that age what would be the effect of her father representing her as guardian at the ceremony of *nikah*? There can be no doubt that Qasim Hasan did give sanction on behalf of the girl to the marriage, but the Subordinate Judge has found that no sanction was obtained from the girl herself. There is clear evidence on the record that her permission (*Izn*) was not asked before the ceremony was carried through. We have therefore to consider what is the *Shia* law relating to the age of

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puberty. The Subordinate Judge has stated that in the case of *Shias* the age of puberty begins with menstruation and under the *Shia* law the presumption is that menstruation takes place between the age of nine and ten years. There seems to be no doubt that this is the law as laid down in the *Sharaya-ul-Islam*. We might also refer in this connection to a case which was decided by their Lordships of the Privy Council in the year 1873, the case of *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan* (1). If, therefore, there were no evidence of age in the case it would, under this law, be presumed that Musammat Amina Khatun had attained the age of puberty long before this *nikah* took place. We know the age of the girl definitely. She was, as we have said, born on the 24th of November, 1904, and, therefore, she was all but 13 years of age when the *nikah* took place.

The Subordinate Judge has made a careful analysis of certain direct evidence bearing upon this point. The plaintiff herself, her father, her mother and a *hakim* named Fazal-ur-Rahman, all say that menstruation had begun before the year 1917. As against this the defendants put forward the statement of another *hakim* named Fuzail Ahmad. We agree with the Subordinate Judge that this man's evidence is of no value. Over and above this all, we think it is in accordance with probabilities that the girl should have begun to menstruate before September, 1917. There is the authority of works on medical jurisprudence. We may refer to the new edition of Lyons' Jurisprudence, edited by Mody, in which it is said that the rule in India is that girls begin to menstruate between the ages of 12 and 14. Having regard therefore to all circumstances, we are of opinion that this girl had attained puberty before September, 1917.

There being no pretence that her consent to the marriage was formally asked for before the ceremony

(1) (1873) 26 W. R. (C. R.), 26.

took place, the presumption would be that the *nikah* was invalid and does not bind the plaintiff. It was argued, however, in the court below and has been argued here that although the girl may not have given any formal consent to this marriage, nevertheless her subsequent conduct amounts to evidence that she accepted the marriage and ought to be deemed a consenting party. In this connection the Subordinate Judge has entered upon a long discussion regarding the nature of the consent which was given by the girl's father. He has come to the conclusion that Qasim Hasan was deceived into agreeing to this marriage by a promise made to him by Wazir Ahmad that in the event of the marriage taking place half of the property which had been given away to Ibn Ahmad would be restored to him, Qasim Hasan. We think any discussion of this question is really superfluous, because if the girl had become adult at the time of the *nikah* the consent of her father could not take the place of her own consent which under the *Shia* law is essential.

We have, therefore, to consider whether there is before us any reliable evidence from which it could reasonably be inferred that Amina Khatun assented to this marriage.

In the plaint it was stated that it was only $2\frac{1}{2}$ years before the suit was brought that Amina Khatun came to have knowledge that any ceremony of *nikah* had been performed. The Subordinate Judge has disbelieved this part of the case and we disbelieve it, too. We are quite prepared to believe that the girl and her mother remained for a few weeks in the house of Wazir Ahmad after this *nikah* had taken place and we cannot for a moment believe that either the girl or her mother were ignorant that such a ceremony had been performed. But while we are prepared to go so far, we are not prepared to hold that any conduct of the girl can be pointed to so as to

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justify the conclusion that she ever gave her consent or was willing to be married to the first defendant. The fact that she and her mother remained or were detained in the house of Wazir Ahmad for a fortnight after the ceremony took place is no evidence whatever that she was a willing party to the marriage.

Then we are referred to what took place in Allahabad in the month of December, 1917, and January, 1918. We have already referred to the events of that time, and have stated how it is proved that the plaintiff and her mother were brought to Allahabad to the house of Ibn Ahmad very much against their will.

[The judgement, after referring to certain evidence, continued :—]

Our conclusion is that it is impossible for us to find that any conduct of the plaintiff during the period just referred to affords any indication of her acceptance of the position of being the married wife of Sibt Ahmad.

We have already pointed out that after February, 1918, the girl went off with her father to Hyderabad and we have no evidence of any conduct during the period between her going to Hyderabad and the time the suit was brought which would indicate that she was a consenting party to the marriage. It is true of course that the girl did not during this time take any active steps for the purpose of repudiating the validity of the *nikah* and it has been argued that in view of the great delay in bringing the suit the relief sought by her ought to be refused, it being within the discretion of the court to withhold such relief. On the other hand, there is the consideration that the girl all this time was living with her father and in the circumstances it is not to be expected that she could have taken any action independent of him.

The letters from Qasim Hasan to his father written from Hyderabad indicate that he was still trying to

establish friendly relations between his father and himself and for that purpose he was representing that the plaintiff was being taught the *Sunni* faith. It would in our opinion, have been quite impossible for this girl to have taken any active steps at an earlier stage in order to obtain the declaration she is seeking in this suit. It is likely enough that the suit was brought after Qasim Hasan had quarrelled again with his father and had made a *wakf* of the property to which he claimed to be entitled as an heir of his deceased mother. However that may be, we are of opinion that the record does not afford any reliable evidence to show that Amina Khatun was ever willing to marry the first defendant or has ever been willing since the ceremony was performed to acknowledge that she is lawfully wedded to him. We have come therefore to the conclusion that the Subordinate Judge's judgement and decree must be maintained, except in one particular now to be noticed. The Subordinate Judge in decreeing the plaintiff's suit made Wazir Ahmad, the guardian *ad litem* of the first defendant, personally liable for the costs of the suit. It is complained in the memorandum of appeal that the court below was wrong in awarding costs personally against Wazir Ahmad. We think effect must be given to this plea. We cannot find any authority in the Code of Civil Procedure to award costs personally against a guardian *ad litem*, and we may refer in this connection to a decision of the Madras High Court, *Narasimha Rau* v. *Lakshmipati Rau* (1).

The decree of the court below, therefore, will be varied by directing that the costs of the suit will be borne by the first defendant. With this modification in the decree of the court below we dismiss this appeal with costs to the plaintiff respondent.

Appeal dismissed.

(1) (1881) I. L. R., 3 Mad., 263.