Adam Vs. Mammad

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Court : Kerala

Decided On : Mar-23-1990

Reported in : II(1991)DMC214

Judge : Pareed Pillay, J.

Acts : Muslim Law

Appeal No. : A.S. No. 118 of 1983

Appellant : Adam

Respondent : Mammad

Advocate for Def. : P.V. Madhavan Nambiar, Adv.

Advocate for Pet/Ap. : E. Venugopalan Nayanar, Adv.

Disposition : Appeal dismissed

Judgement :

Pareed Pillay, J.

1. Plaintiffs are the appellants. They filed the suit for damages alleging that the defendant relied from the agreement to give his daughter in marriage to the third plaintiff. The Sub Judge dismissed the suit.

2. Defendant contended that there was only a proposal or enquiry regarding the marriage and that no agreement as such was entered into between the parties and so the plaintiffs cannot claim any amount as damages.

3. The true position of a Muslim Marriage is expounded in Abdul Khadir v. Salima (8 Allahabad 149) thus:-

'Marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnised generally with recitation of certain verses from the Kuran, yet the Muhammadan Law does not positively prescribe any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. And though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other, of the contracting parties, or of their natural and legal guardians before competent and sufficient witnesses; as also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case'.

As Muslim marriage is basically contractual, there cannot be a valid marriage without consent of the parties when they are capable of giving it.

4. As Mahomadan Law treats the marriage as a civil contract, presence of witnesses is necessary. The contract of marriage must be in the from of a declaration and acceptance expressed at one meeting and uttered by the parties entering into the contract (either for themselves or as proxies or as guardians) in the presence and hearing of each other. Under Hanafi and Shan Laws it must be in the presence and hearing of two witnesses simultaneously present The witnesses must be sane, of full age and professing Islamic faith. UnderHanafi Law at least one of the two witnesses must be a male. Under Shafi Law both witnesses must be males. A marriage is not valid unless consented to by an adult girl. Shafi and Malik schools hold that the consent must be given through a Wali. In a case where there is no evidence of the adult girl giving her consent the marriage cannot be held to be valid even though her , father had consented to it. The essential

legal principle under Muslim Law is that as the marriage is a civil contract consent of the contracting parties must be there.

5. In Hassan Kutti Beary v. Jainabha (1929-52 I.L.R. Madras Series 39==AIR 1928 Madras 1285) Division Bench of the Madras High Court held that Nikah preformed without the knowledge and consent of a Shafi adult virgin is invalid. In the above case, the consent of the girl was not obtained by her father for the performance of the Nikah. It was held that the consent of an adult virgin even among the Shafi sect is essential for the validity of the marriage and that the only difference between the Hanafi Law and the Shafi Law on this point is that under the Shafi Law the consent must be expressed through a Wali and not direct. Having regard to the concept of marriage as a contract in the Mahomadan Law, marriage between two adult persons can be held to be valid only if they have consented to it.

6. It is also useful to refer to K. Abubukker v. V. Marakkar (AIR 1970 Ker. 277) where this Court held in paragraph 8 thus :

'Marriage among Muslims being a contract and the contracting parties being the husband and the wife the consent contemplated in the Shafi sect is that of the wife and not of the father or grand-father or any other person who acts as the Wali at the time of the marriage. The person who acts as the Wali only communicates the consent of the wife to the Kazi who conducted the marriage and the husband.'

7. The principle is that when a girl is adult and discreet, no one has a right to be her guardian to give consent for the marriage. Nevertheless it is always open to her authorise her father or guardian to settle the terms of the contract for her. That does not mean that the father or guardian without her consent can give her in marriage. Whenever it is found that the consent of the parties has not been obtained it has to be held that there is no valid contract of marriage. As P.W. 1 himself admitted that consent of the girl and the boy was not taken there is insurmountable difficulty to uphold the plea of valid marriage.

8. P.W. 1 stated that as per the custom prevailing in the locality consent of the parents alone is sufficient for a valid marriage. Apart from P.W. 1's ipse dixit, there

is no evidence in proof of any such custom. Where a plea of a custom different from Mahomadan Law is pleaded the onus of proof is squarely upon the person who sets up the play. The burden of proof in pleading a custom in derogation of Mahomadan Law is very heavy as the invariable and general presumption is that Muslims are governed by Mahomadan Law. The burden is realy heavier when the custom set up is contrary to well accepted schools of law followed by Muslims.

9. The trial Court is correct in holding that as there is no valid contract there is no question of suing for damages on account of its breach. There is no merit in the appeal. Appeal is dismissed without costs.