

Abdul Azeez Vs. Pathumma Bi

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Court : Chennai

Decided On : Nov-15-1951

Reported in : AIR1952Mad754; (1952)1MLJ463

Judge : Rajamannar, C.J. and ;Venkatarama Ayyar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 32, Rule 1; [Majority Act, 1875](#)
- Sections 2

Appeal No. : Civil Revn. Petn. No. 300 of 1951

Appellant : Abdul Azeez

Respondent : Pathumma Bi

Advocate for Def. : B. Porker and ;S.M. Mohideen, Advs.

Advocate for Pet/Ap. : C.S. Swaminatha Ayyar, Adv.

Judgement :

1. The point that arises for consideration in this civil revision petition is whether the plaintiff, who is a minor under the Indian Majority Act but who is a major according to her personal law, is entitled to bring a suit for dissolution of her marriage without a next friend. The learned District Munsif of Ottapalam, who heard the petition of the defendant filed under Order 32 Rule 1 of the Civil Procedure Code praying that the suit O. S. No. 496 of 1950 on the file of the said Court should be dismissed on the ground that the plaintiff therein being a minor was not entitled to bring the suit

without the next friend, dismissed the same following the decisions in 'Ahmed Sulaiman v. Mt. Bai Fatma', AIR 1931 Bom 76, 'Nakase-Tan Bibi v. Habibar Rahiman', AIR 1948 Cal 66 and Khatom bi v. Abdullatin', 4 Cal 78 (sic) and holding that the plaintiff was competent to sue for dissolution of her marriage without a next friend and that the suit as framed was maintainable. The defendant has preferred this civil revision petition against the said decision of the learned District Munsif of Ottapalam.

2. Mr. C. S. Swaminatha Aiyar appearing for the petitioner has Invited my attention to the decision in Ithayi Umah v. Kairhirapokoil, 3 Mad 248, a Bench decision wherein it has been held that:

" Section 2 of Act IX of 1875 (Indian Majority Act) refers only to the capacity to contract which is limited by Section 11 of the Contract Act, and not to the capacity to sue, which is purely a question of procedure and regulated by the Civil Procedure Code, Chapter XXXI".

3. This decision has been followed in 'Abidhunnissa Bibi v. Muhammad Fathi Uddin', 41 Mad 1026. This again is a Bench decision and in that decision it has been held that:

"A relinquishment of her right to dower by a Muhammadan woman who is a minor, under the Indian Majority Act, is invalid under the Indian Contract Act (IX of 1872). To relinquish dower is not to act in the matter of dower within the Section 2 of the Indian Majority Act".

Apart from these two decisions, no other decision of this court on the point in question has been brought to my notice. In 'Usman Ali Khan v. Mt. Khatoon Banu', 17 Luck 572 relied upon by the learned counsel for the petitioner it has been held that:

" Section 2(a) of the Indian Majority Act does not prevent a Muhammadan girl of 15 years of age from bringing a suit for dower through a next friend and the decree obtained in such a suit is not a nullity".

Though in this case objection was taken that the suit brought on behalf of the minor through the next friend was incompetent, still the decision has turned upon the interpretation of the words occurring in Section 2(a) of the Indian Majority Act viz., "to act in the matter of dower". It has been held in that decision, after a review of all the cases including 'Ithahi Umah v. Kairhirapokoil', 3 Mad 248, 'ABI DHUNNISSA BIBI v. MUHAMMAD FATHIUDDIN', 41 Mad 1026 and cases of other High Courts as well, that the words "to act in the matter of dower" in Section 2(a) are to be given only a restricted meaning and do not include the bringing of a suit for dower and that that section merely relieves the plaintiff of some of the consequences of her minority, but she remains a minor nonetheless. That being so it was held, the provisions of Order XXXII Rule 1, C. P. C. still apply and so in respect of the institution of suits she will have to act through her next friend. In 'NAJMUN-NISSA BEGUM v. SIRAJUDDIN AHMED KHAN', 17 Pat 303 which has also been referred to in the Lucknow Full Bench decision the decision in 'ABI DHUNNISSA BIBI v. MAHOMED FATHIUDDIN', 41 Mad 1026 was followed and it was held that: "Once a marriage has been performed and the dower is settled, a wife who (although a major according to the personal law of the lady) is still a minor under the [Majority Act, 1875](#) is not competent to relinquish the whole or part of her dower to change its character". The Bench which decided the case distinguished it from the decisions in 'QUASIM HUSSAIN BEG v. KANIZ SAKINA', 54 All 806 and 'MOZHARUL ISLAM v. ABDUL GANI ALA', AIR 1925 Cal 322. In 'MAUNG TUN AUNG v. MA E. KYI', 14 Rang 215 the terms "capacity to act in the matter of marriage" came up for consideration and it was held that:

"The expression "capacity to act in the matter of marriage" in Section 2 of the Majority Act means the capacity to be a party to a valid marriage and relates to the acts of the parties by which their status is changed; the expression does not refer and is not applicable to a pre-nuptial agreement to contract a marriage in the future."

Though in this case the parties were Burmese, nevertheless the discussion on the terms of Section 2(a) of the Indian Majority Act was relevant as the decision turned only upon that issue. This Full Bench also reviewed several of the decisions that had been placed before it such as 'BAI SHIRINBAI v. KHARSHEDJI', 22 Bom 430;

'ABIDHUN-NISSA BIBI v. MUHAMMAD FATHIUDDIN, 41 Mad 1026; 'FATIMA KHATUN v. FAZLUL KA-RIM', 47 Cal LJ 372 and so forth.

4. It will thus be seen that all the four High Courts, viz; Madras, Lucknow, Patna and Ran-goan are of one opinion, viz., that a suit by a minor under the Indian Majority Act, but who is a major under the personal law governing the party, cannot be filed for any purpose connected with her marriage without a next friend acting on her behalf. As against this, the High Courts of Bombay, Calcutta and Allahabad take quite a different view and they hold that it is permissible for a minor under the Indian Majority Act but who is a major under her personal law to bring a suit for dissolution of her marriage without the aid of a next friend, and the interpretation put upon the words "to act in the matter of marriage" was that it should not be restricted to the mere Right to contract but should extend also to the right to file a suit or otherwise enforce her rights through a court of law. In 'AHMED SULEMAN v. BAI FATMA', 55 Bom 160 a Bench of two Judges of the Bombay High Court held that:

"Under the Mahomedan law a wife of 16 years of age is entitled to sue for divorce, without a next friend by virtue of Section 2(a) of the Indian Majority Act. The case of Parsis is different."

They followed the decision in 'BAI SHIRINBAI v. KHARSHEDJI', 22 Bom 430 wherein it was said that the Majority Act did not use the expression "capacity to contract" but used only the words "capacity to act" which were said to be of much wider import. In 'MT. FATIMAKHATUN v. FAZLUL KARIM', 47 Cal LJ 372 and 'NAKSETAN BIBI v. HABIBAB RAHMAN', AIR 1948 Cal 66 it was held by the Calcutta High Court that:

"Section 2, Majority Act, does not merely create certain exceptions to Section 11, Contract Act, but the words "to act" are wide enough to include in it the institution of a suit. A suit instituted by a Muslim minor girl, who has attained her puberty, for dissolution of marriage is covered by expression 'the capacity of any person to act in the matter of marriage, divorce etc. and is maintainable without a next friend.'"

5. The cases in 'Mt, Fatima Khatun v. Fazlul Karim', AIR 1928 Cal 303 and Tthahi Umah v. Kairhirapokoil', 3 Mad 248 was referred to and distinguished. In 'Qasim Hussain Beg v. Kaniz Sakina', 54 All 306 Sulaiman C. J. and Iqbal Ahmed J. considered the question of relinquishment of dower by a minor muslim wife 'vis-a-vis' Section 2 of the Indian Majority Act and held that:

"The settlement of dower or its relinquishment comes within the exception contained in Section 2 of the Indian Majority Act. The agreement about the payment of a certain amount of dower is a part of the contract of marriage and a person who is a minor under the Indian Majority Act, but a major under the Muhammadan law, is capable of relinquishing the dower as consideration for obtaining 'Khula', which is a form of divorce recognised by the Muhammadan law and comes within the exception mentioned above."

This decision agreed with the opinion expressed by the Calcutta High Court that the settlement of dower or its relinquishment would come within the exception contained in Section 2 of the Indian Majority Act.

6. There is thus a conflict of opinion between the High Courts of Madras, Lucknow, Patna and Rangoon on the one hand and those of Bombay, Calcutta & Allahabad on the other. No cases of any other High Court have been placed before me and no decision of this court later than 'Abi Dhun-Nissa Bibi v. Muhammad Fathi Uddin', 41 Mad 1028 has been made available on this question.

In these circumstances, and in view of the conflict between several High Courts on this question, and this High Court having had no occasion to review the decisions of the other High Courts which have come in the wake of 'Abidhunnissa v. Moha-Med Fathi Uddin', 41 Mad 1026 and considering for the importance of the question, I think it is desirable that the matter should be decided by a Bench of this High Court. I therefore refer this petition for decision to a Bench to be constituted for the purpose by my Lord the learned Chief Justice.

OF DIVISION BENCH

Rajamannar, C. J.

7. The question of law which falls for decision in this case is whether a Muslim woman who is a major according to her personal law but is a minor according to the provisions of the Indian Majority Act is entitled to bring a suit for dissolution of her marriage without being represented by a next friend. This case originally came up before Basheer Ahmed Sayeed J. who found a divergence of opinion on the point between several High Courts and having regard to the importance of the question thought it desirable to be decided by a Division Bench.

8. Order 32, Rule 1, C. P. C. lays down that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. There are no exceptions to this general rule of procedure contained in the Code itself. There is no definition of a minor in the Code nor in the General Clauses Act. The Indian Majority Act, IX of 1875 provides that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before. This rule is, however, subject to certain exceptions contained in that Act. We are concerned with the exception embodied in Section 2(a) of that Act which runs as follows:

"Nothing herein contained shall affect.....

(a) the capacity of any person to act in the following matters (namely) marriage, dower, divorce and adoption."

Prima facie, this provision means not that a person ceases to be considered a minor under the Indian Majority Act but that the fact that the person is a minor does not affect the capacity of that person to act in certain matters. The question is whether by reason of this provision an exception can be grafted to Order XXXII Rule 1 of the Code and it can be held that a minor within the meaning of the Indian Majority Act and therefore within the meaning of the Civil Procedure Code can institute a suit in respect of the matters specified therein in a Civil Court governed by the Code without being represented by a next friend. Apart from authority, we think he cannot. Section 2(a) saves only the capacity of a person to act in certain matters and not to act in suits or legal proceedings relating to such matters or of which the subject-matter is one or other of the matters therein mentioned. It means for instance that a person can marry or adopt though he or she is a minor within

the meaning of the Indian Majority Act. It is one thing to say that a person can act in the matter of adoption and another to say that he can institute a suit to declare the validity of his adoption or to obtain reliefs on the basis of his adoption.

9. Order XXXII, Rule 1 enacts a rule of procedure. It does not nor does it purport to affect the substantive rights of parties. Even though represented by a next friend, the suit instituted in accordance with Order XXXII Rule 1 is nevertheless a suit by the minor. The rule only insists on a particular procedural condition being fulfilled. But for Order XXXII, Rule 1 there is nothing in the general law of the land which would prevent a minor from instituting legal proceedings without a next friend. A minor can, without being represented by a next friend, institute criminal proceedings. He can even file a suit for the recovery of a sum not exceeding Rs. 500 which is due to him for, wages or for piece of work or for work done as a servant in the Presidency Small Cause Court, without a next friend. It is therefore clear that there is nothing in Section 2(a) of the Indian Majority Act which overrides the provision in Order XXXII, Rule 1.

10. The point is directly covered by the decision of a Division Bench of this court in 'Ithayi Umah v. Kairhirapokoil', 3 Mad 248 . The question referred for decision in that case was whether a minor Muhammedan female can in her own name sue her husband in respect of maintenance, dower etc. It was urged in the court below that the Indian Majority Act had no application because of the provisions of Section 2(a) of that Act. The lower court was of opinion that that provision referred only to the capacity to contract and not to the capacity to sue which was purely a question of procedure and was regulated by Chapter XXXI C. P. C. The learned Judges, Sir Charles Turner C. J. and Tarrant J. were of the opinion that the lower court had correctly apprehended and expressed the law. A similar view was taken in 'Usman Ali Khan v. Mir Khatoon Banu', 17 Luck 572 which dealt with a suit for dower. The learned Judges held that the words "to act in the matter of dower" in Section 2(a) of the Indian Majority Act should be given a restricted meaning and do not include the bringing of a suit for dower. The learned Judges observed that Section 2(a) merely relieves a minor of some of the consequences of minority but she remains a minor nonetheless. "That being so, the provisions of Order XXXII,

Rule 1, C. P. C. still apply. So in respect of the institution of suits he will act through her next friend".

Authority, however, is not wanting for the contrary view. In 'Ahmed Suleman v. Bai Fatma', 55 Bom 160 one of the points which arose for decision was whether a suit for divorce by a Muhammadan woman of 16 could be instituted without a next friend or guardian. The case was decided by a Division Bench consisting of Madgavkar and Barlee JJ. Madgavkar J. answered the question in the affirmative by a reference to the provisions of Section 2(a) of the Indian Majority Act and by holding that the wife suing for her divorce acts in the matter of divorce. The other learned Judge, Barlee J. though he delivered a separate judgment, did not deal with this point. There is no reference in this case to the earlier decision of our court in 'Ithayi v. Kaihirapokoil', 3 Mad 248. Akram J. sitting alone took the same view in 'Nak-Setan Bibi v. Habibar Rahiman', AIR 1948 Cal 66. In his opinion the words "to act" in Section 2(a) of the Indian Majority Act are wide enough to include the institution of a suit by a minor, who under his or her personal law may have attained majority. The learned Judge followed the decision in 'Ahmed Suleman v. Bai Fatma', 55 Bom 160. The attention of the learned Judge was invited to the decision in 'Ithayi Umha v. Kaihirapokoil', 3 Mad 248 but he purported to distinguish that decision by observing that that was a case for recovery of stridhan also and clearly would not be covered by Section 2 of the Indian Majority Act. With great respect to the learned Judge we do not think that this is a fair way of distinguishing that decision. Though no doubt it appears from the narration of the facts that the suit was 'inter alia' also for recovery of stridhana the reasoning of the learned Judges does not advert to this fact nor is it based on that circumstance.

11. We have no hesitation in expressing our respectful agreement with the decision of our court in 'Ithayi Umha v. Kaihirapokoil', 3 Mad 248. There is nothing in the reasoning of Madgavkar J. in 'Ahmed Suleman v. Bai Fatma', 55 Bom 160 nor of Akram J. in 'Naksetan Bibi v. Habibar Rahman', AIR 1948 Cal 66 which commends itself to us. On the plain reading of Section 2(a) and (3) of the Indian Majority Act and Order XXXII, Rule 1, C. P. C. only one conclusion appears to us to be possible, viz., that a suit by a person who is a minor within the definition contained in section 3 of the Indian Majority Act, cannot be instituted except by a

next friend of the person.

12. The learned District Munsif was therefore wrong in holding that the suit was properly instituted. The petitioner before us, the defendant in the court below took out an application praying that the suit may be dismissed on account of this defect in the presentation. We do not think that it is proper to follow this course. We think that the proper course is to return the plaint as not having been properly presented, we direct the learned District Munsif to do so. The civil revision petition is to this extent allowed. There will be no order as to costs here and in the court below.

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