

Sm. Achia Khatoon Vs. Abdul Hai

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Court : Kolkata

Decided On : Sep-14-1948

Reported in : AIR1952Cal381

Judge : Das Gupta, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 115 - Order 3, Rule 4 - Order 7, Rule 9 - Order 32, Rules 1 and 2 - Order 43, Rule 1; ;[Majority Act, 1875](#) - Sections 2 and 3

Appeal No. : Civil Rule No. 825 of 1948

Appellant : Sm. Achia Khatoon

Respondent : Abdul Hai

Advocate for Def. : Asir, Adv.

Advocate for Pet/Ap. : Bholanath Roy, Adv.

Judgement :

ORDER

Das Gupta, J.

1. This Rule is directed against an order of the learned Munsif, passed under Order 32, Rule 2 Civ. P. C. directing a plaint filed by a Mahomedan girl, admittedly,

just over 15 years of age on the date when the suit was filed, i.e., 24-5-1947, ((?) to be taken off the file. The learned Munsif was ,of the opinion that she being under 18 years of age was a minor, according to the Indian Majority Act, & so in view of the provisions of Order 32 Rule 1, Civ. P. C. it was necessary that the suit by her should have been Instituted in her name by her next friend.

2. A preliminary point was taken on behalf of the opposite party that an appeal did lie against the order of the Munsif, & so the application, under Section 115, Civ. P. C. was not maintainable. Order 43, Rule 1 has not included an order passed under Order 32, Rule 2 among the orders from which an appeal will lie under the provisions of Section 104, Civ. P. C. I am unable to agree with the learned Advocate for the opposite party that such an order under Order 32, Rule 2 should be read to amount to an order under Order 7, Rule 9, returning a plaint to be presented to the Court in which a suit should have been instituted. This is not a case of return of the plaint, & there could be no ground for returning the plaint as there was no dispute as to the Court in which this suit should have been instituted. I hold, therefore, that no appeal did lie, & so the application under Section 115 Civ. P. C. is maintainable.

3. It is contended before me by the learned Advocate for the petitioner in support of the Rule that the provision of Section 3, Majority Act (IX (9) of 1875) under which all persons except those for whose person or property a guardian has been appointed by a Court of justice, & those under the jurisdiction of any Court of Wards shall be deemed to have attained majority when he has completed 18 years & not before, has no application to the case of a Mahomedan girl bringing a suit for dissolution of marriage. Reliance is placed by him on the provision of Section 2 of the same Act which provides that:

'Nothing herein contained shall affect-(a) the capacity of any person to act in the following matters (namely) - Marriage, Dower, Divorce, & Adoption;.....'

The question really is whether the expression 'the capacity of any person to act in the following matters' covers the capacity of a person to bring a suit in these matters. I do not see any reason why the language used in Section 2 should be restricted by the Court. The law as regards majority puts certain restraints against

acts by certain persons, & where the Legislature has thought fit to remove these restrictions in certain matters, there is no justification for widening the field of the restriction. This question came up for consideration before this Ct. in the case of *Nakestan Bibi v. Habibar Rahaman*', 50 C. W. N. 689, & it was held that:

'the words 'capacity to act' are wide enough to include in it the institution of a suit by a minor who under her personal law may have attained majority.'

I respectfully agree with this decision.

4. Once it is held that the provisions of Section 3 of the Majority Act are not applicable, it is not disputed that by her personal law, this girl having attained the age of 15 years has attained majority. Therefore, a suit by her without a next friend is not against the provisions of Order 32, Rule 1, Civ. P. C.

5. A point was raised by the learned Advocate for the opposite party that if a person under 18 years is in this manner allowed to institute a suit without a next friend, difficulties may arise on the question of her engagement of lawyers on her behalf. Though it does not seem to be necessary for the purpose of this application to decide this question, I may indicate my view that, if she is in law a major person in all matters regarding marriage, dower, divorce & adoption, her engagement as a major of a lawyer in suits in these matters should present no difficulty.

6. I hold, therefore, that the learned Munsif acted illegally in the exercise of jurisdiction in ordering the plaint to be taken off the file. His order is set aside & he is directed to dispose of the case according to law.

7. The Rule is made absolute. The petitioner is entitled to get the costs of this Rule from the opposite party.