
(1977) 04 BOM CK 0027
In the Bombay High Court
Case No : Second Appeal No. 318 of 1970

Mahmad Usaf Abasbhai Bidiwale

APPELLANT

Vs

Hurbanu Mansur Atar

RESPONDENT

Date of Decision : 12-04-1977

Acts Referred:

Contract Act, 1872 — Section 64, 65

Citation : (1979) 81 BOMLR 102 : (1978) MhLj 26

Hon'ble Judges : Sawant, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sawant, J.—Plaintiffs Nos. 1 and 2 who are the grand-daughter and grand-father respectively had filed Regular Civil Suit No. 227 of 1966, in the Court of Civil Judge, Junior Division, Karad, against defendants Nos. 1 and 2 who are son and father respectively for recovering a sum of Rs. 1,295 being the value of various articles given to defendant No. 1 in his marriage with plaintiff No. 1. According to the plaintiffs, the marriage between plaintiff No. 1 and defendant No. 1 was performed on December 5, 1965. Before the marriage, there was an agreement entered into between plaintiff No. 1 and defendant No. 2 on December 25, 1964 and by virtue of the said agreement, it was agreed that the plaintiffs would give defendant No. 1 certain articles such as golden ring, utensils, etc. in consideration of the defendant No. 1 marrying plaintiff No. 1. Plaintiff No. 1 and defendant No. 1 lived as husband and wife till August 9, 1966, on which date defendant No. 1 pronounced talaq. According to the plaintiffs, plaintiff No. 1 was not at all at fault and the marriage was terminated by defendant No. 1 Unilaterally. Plaintiff No. 1 was ready and willing to live with defendant No. 1 as his wife. The plaintiffs, therefore, claimed that the articles which were given to defendant No. 1 in consideration of the said marriage were liable to be returned by defendant No. 1, and hence they served a notice on September 19, 1966, on the defendants asking them to return the said articles. The defendants having

failed to comply with the said notice, the present suit was filed.

2. By their written-statement, the defendants denied that defendant No. 1 had given divorce to plaintiff No. 1 without any cause. They further denied that the plaintiffs would be entitled to claim the return of the said articles. They also disputed the number as well as the nature of the articles alleged to have been given by the plaintiffs. In the alternative, they also contended that the articles were given as and by way of gifts or presents and hence the same were not liable to be returned. On these pleadings, the trial Court framed the necessary issues and came to the conclusion that the plaintiffs had proved that they had given defendant No. 1, at the time of the marriage, articles valued at Rs. 812.20. The Court also held that the said articles were given in consideration of the contract of marriage and not by way of gifts or presents. The Court further held that only defendant No. 1 was liable to return the said articles, and decreed the suit of the plaintiffs against defendant No. 1, to the extent of Rs. 812.20, holding that u/s 65 of the Contract Act, defendant No. 1 was liable to return the said articles or their value. The Court dismissed the plaintiffs' suit as against defendant No. 2. This decree dated April 2, 1968 was challenged by defendant No. 1 by Civil Appeal No. 161 of 1968 filed in the District Court, Satara. The learned Assistant Judge, Satara, who heard the said appeal, confirmed the findings given by the trial Court and dismissed the appeal by his order dated September 2, 1969. It is this order which is challenged in this second appeal.

3. Mr. Pratap, the learned counsel appearing for the defendant No. 1, raised four contentions. His first submission was that the articles in question were given as a gift or present out of love and affection on the occasion of marriage. They were not given in consideration of marriage and, hence, the same were not liable to be returned. His second contention was that even assuming that the said articles were given in consideration of marriage, the appellant had performed his part of the contract, namely, he had married plaintiff No. 1 and, therefore, a subsequent divorce would not make him liable to return the said articles. His third submission was that in any case, since the contract was rescinded, both the parties were liable to return the benefits which were received under the contract and it was improper for the Courts to have asked only the appellant to return the benefits under the contract. By his last submission, he challenged the correctness of the finding given by the Courts below that articles of the value of Rs. 175 also formed part of the articles given to the appellants. In this connection he submitted that the said articles were not named in the yadi, exh. 32, relied upon by the plaintiffs and, therefore, their oral testimony in that behalf should not have been accepted by the lower Courts.

4. Mr. Rane, the learned counsel, appointed amicus curiae in, the absence of any appearance on behalf of the respondent-plaintiffs, submitted that under the Mahomedan law, marriage was a contract and the evidence on record showed that the articles in question were given to the appellant under the said contract. The appellant had rescinded the contract unilaterally, and therefore, in view of

Section 64 of the Contract Act, he was liable to return the benefits, namely, the said articles; "received under the said contract. He also submitted that the contract of marriage envisaged that the appellant and plaintiff No. 1 would remain united in the marital bond as husband and wife and the contract was not confined only to the act of undergoing a marriage-ceremony. Hence, the appellant had not fulfilled his part of the contract when he rescinded the same unilaterally. He further submitted that Section 64 of the Contract Act envisages the return of the benefits only by the person rescinding the contract and there was no obligation on the other side to return the benefits. In reply to the last contention advanced by Mr. Pratap, Mr. Rane submitted that whether the articles valued at Rs. 175 were also given along with those mentioned in the yadi, exh. 32, or not, is a pure question of fact and both the Courts having held that the said articles were also given along with others, this Court should not disturb the said finding of fact. In this connection, he also pointed out that before the appellate Court, the only contention which was raised was that the articles in question were given as a present or gift and not in consideration of marriage. There was no dispute raised with regard to the value of articles so given at the time of marriage.

5. I am of the view that there is no substance in any of the contentions raised on behalf of the appellant. As regards the first contention, namely, that the articles in question were given not in consideration of marriage, but only by way of gift, out of love and affection, firstly, I find that both the Courts have come to the conclusion, on the evidence on record, that the said articles were given in consideration of marriage and not By way of a present or gift as contended. The evidence which has been taken into account by the Courts below is the yadi, exh. 32, which was prepared on or about December 25, 1964 about a year prior to the marriage which was performed on December 5, 1965. That yadi or list begins with a recital that it was decided to bring about a marriage between the plaintiff No. 1 and the appellant and then follow the terms of the agreement. Two of the terms, viz. term No. 2 and 4 mention the articles which were to be given) by the bride's side to the bridegroom. In addition to proving the said written agreement, the plaintiffs led oral evidence to show that some articles valued at Rs. 175 not mentioned in the agreement were also given to the appellant at the time of the marriage. It is not disputed that the total value of the articles mentioned in the list and of the said additional articles would be Rs. 812.20. Accepting this evidence, the Courts below held that all the articles which were thus given to the appellant were in consideration of the contract of marriage. In fact, it appears from the said evidence on record that the delivery of the said articles was a condition precedent to the performance of marriage. In this view of the matter, it is difficult to accept the contention that the said articles were not given in consideration of marriage, but were given by way of gift.

6. In view of the said unassailable finding that the articles were given in consideration of marriage, the only question that requires consideration, is whether they were liable to be returned in view of the termination of the

marriage. It is well-settled that marriage under the Mahomedan law is a civil contract. Hence it should attract all the incidents of contract as any other contract. The rescission of a Muslim marriage therefore will entail consequences stipulated in the Contract Act. The "provisions of Section 64 of the Contract Act, will be squarely applicable to a case such as the present one where the marriage has been rescinded unilaterally by defendant No. 1. In this view of the matter, the defendant No. 1 will become liable to return all the articles which he has received in view of the finding that the articles in question were received by the defendant No. 1 in consideration of, and therefore as benefits under the contract of marriage.

7. It is true that while giving their findings, both the Courts below have proceeded on the footing that it is the provisions of Section 65 of the Contract Act which will govern the present case. That reasoning is obviously erroneous. Section 65 provides for the consequences of the rescission of a void contract. The present case is undisputedly not a case of a void contract, but of a voidable one at the instance of one of the parties. Defendant No. 1 has rescinded the contract unilaterally and, therefore, the provisions which are properly applicable to the present case are those of Section 64 of the Contract Act. However, although the Courts below have based their reasoning on the provisions of Section 65, that has not made any difference to the ultimate order which they came to pass. It is, however, necessary to correct their reasoning and hold, as stated above, that the present case will be governed by the provisions of Section 64 and not of Section 65 of the Contract Act.

8. As regards the next submission, namely that the defendant No. 1 had performed his part of the contract by marrying plaintiff No. 1, and therefore he was not liable to return the said articles, the same has only to be stated to be rejected. The contract of marriage envisages that the parties will remain united in wedlock till the end, as husband and wife. The contract cannot be construed to mean only a commitment to undergo the ceremony of marriage or to consummate the marriage or to live as husband and wife only for some time. And yet, this will be the result if the contention advanced on behalf of the appellant is accepted.

9. The third contention advanced is equally misconceived. In the first instance, the evidence shows that it was defendant No. 1 who had put an end to the marriage by pronouncing talaq, by executing the talaq-e-nama on August 9, 1966. The plaintiff No. 1 was at all times ready and willing to remain with defendant No. 1 as his wife and she had no intention to break the marriage. Therefore, it will have to be held that it was defendant No. 1 who had unilaterally rescinded the said contract of marriage. The provisions of Section 64 of the Contract Act are clear in this behalf and require only that person to return the benefits under the Contract, at whose option the contract is rescinded. There is no obligation cast on the other party to return such benefits. Even otherwise, it will have to be held that since plaintiff No. 1 did not want to break the marriage,

and thus to avoid the contract, and on the other hand she was ready and willing to perform her part of the contractual obligations, she was under no obligation to return the benefits received under the contract.

10. As regards the last submission, namely, that the articles of the value of Rs, 175 have not been mentioned in the yadi, exh. 32, and hence the lower Courts ought not to have granted the decree for the said value, in the first instance, the Courts below have come to the conclusion on the basis of the oral evidence on record that the articles of the said value though not mentioned in the yadi, were given to the defendant No. 1, in consideration of marriage. This being a finding of fact, it will not be open for this Court to disturb the same in this second appeal. Secondly, the contention that the said articles were not mentioned in the yadi, exh. 32, and therefore, the Courts below ought not to have allowed the claim, is not sound. It must be remembered that the plaintiffs had gone to the Court with their case that certain articles were handed over to the defendant No. 1 at the time of marriage. In support of their said case, one of the pieces of evidence on which they relied was the yadi, exh. 32. It was not their case that all the articles which were given to defendant No. 1 were mentioned in the yadi. This is not a case, where as contended by Mr. Pratap, the whole of the contract was reduced to writing and therefore no oral evidence in respect of the same could be led. In this view of the matter, I find that there is no substance in this contention also.

11. The appeal is therefore dismissed. In view of the fact that there is no appearance filed on behalf of the respondents, there will be no order as to costs.