

(2014) 12 GUJ CK 0008

In the Gujarat High Court

Case No : Misc. Criminal Application (For quashing and set aside F.I.R./Order)
No. 19811 of 2013

Mujamil Abdulsattar Mansuri

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 01-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 1
Criminal Procedure Code, 1973 (CrPC) — Section 482
Majority Act, 1875 — Section 1 2 2(a) 3 4
Penal Code, 1860 (IPC) — Section 360 361 363 366

Citation : (2015) 3 Crimes 231 : (2015) 3 DMC 303 : (2015) 1 GLR 824

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : Vijay Patel and H.L. Patel, Advocate for the Appellant; A.N. Shah,
A.P.P., Advocate for the Respondent;

Final Decision : Allowed

Judgement

J.B. Pardiwala, J.

1. By this application under Sec. 482 of the Code of Criminal Procedure, 1973, the petitioner original-accused seeks to invoke the inherent powers of this Court, praying for quashing of the First Information Report being CR. No. 1-20 of 2013 registered with the Dholka Police Station, dated 1st February, 2013, of the offence punishable under Secs. 363 and 366 of the Indian Penal Code. The facts giving rise to this application may be summarized as under:

(a) The respondent No. 2 is a resident of Dholka, District Ahmedabad. He is earning his livelihood by plying an auto-rickshaw. He has one son, namely, Sohil, aged 19 years and two daughters, namely, Reshambanu, aged 17 years and Sabnam, aged 10 years respectively.

(b) On 1st February, 2013, the respondent No. 2 lodged the First Information Report stating that in the morning he had left his house to ply the rickshaw, and

in the afternoon, when he returned home, his wife informed him that Reshambanu had gone away somewhere since 11-00 O'clock in the morning. Thereafter, the first informant started searching for his daughter Reshambanu at the house of his relatives and friends. Despite frantic efforts, Reshambanu could not be traced. In such circumstances, the first informant suspected that the applicant herein probably might have enticed Reshambanu and she might have ran away with the applicant herein. The wife of the first informant, therefore, went at the house of the applicant and inquired with the parents of the applicant and the parents of the applicant, in turn, informed the wife of the first informant that their son i.e. the applicant herein was also not to be seen at the house since morning. The parents of the applicant informed the wife of the first informant that they were trying to contact the applicant on his mobile but the mobile had been switched off. In such circumstances, the first informant and his wife reached to a conclusion that their daughter Reshambanu had been perhaps kidnapped by the applicant herein. The first informant, as the father of Reshambanu, thereafter thought fit to inform the Police about the same and the Police recorded the First Information Report.

2. It appears from the materials on record that the first informant herein i.e. the father of Reshambanu also thought fit to file a habeas corpus petition being Special Criminal Application No. 910 of 2013.

3. The habeas corpus petition was not entertained by a Division Bench of this Court since the petitioner, as the father of the girl, had already lodged a report before the Dholka Police Station. The Division Bench observed that the Police would take appropriate action in the matter in accordance with law.

4. The picture that emerges from the materials on record is that the applicant herein and Reshambanu both fell in love with each other as both were residing in the same locality. They both decided to get married, and accordingly, went to Ajmer Sharif, where Nikah was performed by the Kajisaheb of the Ajmer Sharif on 2nd February, 2013. A certificate to that effect has been produced at Annexure "A". At the time when Nikah was performed, the age of Reshambanu was 17 years and odd.

5. Mr. Vijay Patel, the learned Advocate appearing on behalf of the applicant vehemently submitted that even if the entire case of the first informant is accepted as true, none of the ingredients to constitute the offence of kidnapping are spelt out. Mr. Patel submits that it is not in dispute that when Reshambanu left her parental home along with applicant she was aged around 17 years and few months. Mr. Patel submits that the parties belong to the Muslim community. They are governed by their Personal Law i.e. the Mohammedan Law. He submits that a muslim girl, who is above 15 years of age or has attained puberty, is at liberty to marry even if there is no consent from the parents. Mr. Patel has placed reliance on some of the provisions of the Mohammedan Law. Mr. Patel further submits that even if it is assumed for the moment that at the time when the girl left her parental home, she was a minor, yet she had left the parental home on

her own free-will and volition. The girl herself has given a statement before the Police that she was not lured or enticed in any manner by the applicant. She has stated before the Police that she fell in love with the applicant and both decided to get married. Therefore, in such circumstances, Mr. Patel prays that the First Information Report deserves to be quashed as the investigation by the Police would be nothing but an abuse of the process of law.

6. On the other hand, Mr. Sanjay Prajapati, the learned Advocate appearing on behalf of the first informant, has opposed this application submitting that the First Information Report discloses commission of a cognizable offence and the Police should be permitted to complete the investigation. Mr. Prajapati submits that so far as the offence of kidnapping punishable under Sec. 363 of the Indian Penal Code is concerned, the provisions of the Mohammedan Law will have no application. He submits that the age of Reshambanu at the time when she left her parental home was under 18 years of age, and therefore, she could be said to have been kidnapped from the lawful guardianship. Mr. Prajapati places reliance on the provisions of Sec. 361, Sec. 363 and Sec. 366 of the Indian Penal Code. Mr. Prajapati submits that the First Information Report does not deserve to be quashed and the Police should be permitted to complete the investigation. He, therefore, prays to reject this application.

7. Mr. A.N. Shah, the learned A.P.P. appearing on behalf of the respondent No. 1-State of Gujarat has also opposed this application. He submits that it is not in dispute that at the time when Reshambanu is alleged to have been kidnapped by the applicant she was under 18 years of age, and therefore, a minor for the purpose of prosecution under Secs. 363 and 366 of the Indian Penal Code. He submits that being a minor, Reshambanu could not have taken an independent decision of getting married with the applicant without the consent of her parents. Mr. Shah, therefore, prays that this application should be rejected.

8. Having heard the learned Counsel appearing for the parties and having gone through the materials on record, the only question that falls for my determination in this application is, whether the First Information Report deserves to be quashed.

9. The following facts are not in dispute:

(a) The applicant-accused and the first informant are Muslim.

(b) To a certain extent they would be governed by the provisions of the Mohammedan Law. The conflict between the provisions of the Mohammedan Law and the Indian Penal Code so far as the age is concerned, is a matter of debate and I shall consider the same in details.

(c) On the date of the lodging of the First Information Report, the daughter of the first informant was aged 17 years and odd whereas, the applicant was aged around 20 years.

(d) According to the statement of the girl, she had accompanied with the

applicant on her own free-will and volition and there was no enticement or promise of any sort given by the applicant.

10. Since, lot of emphasis has been placed before me on the provisions of the Mohammedan Law, I deem it necessary to look into the same in details.

11. Article 251 of the Mohammedan Law deals with capacity for marriage. It reads as under:

"251. Capacity for marriage:- (1) Every Mahomedan of a sound mind, who has attained puberty, may enter into a contract of marriage. (2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians, (3) A marriage of a Mahomedan who is of sound mind and has attained puberty, is void, if it is brought about without his consent.

Explanation:- Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

This provision clearly shows that every Mahomedan who has attained puberty, is capable to validly contract marriage. The explanation of puberty is presumed, in the absence of evidence, on completion of the age of fifteen years. Therefore, every Mahomedan who has attained puberty can enter into a contract of marriage even if there is no consent of the parents or guardians. Further in absence of evidence, puberty can be presumed on completion of the age of fifteen years."

12. Article 348 deals with the age of majority. It reads as under:

"348. Age of majority:- In this Chapter, "minor" means a person who has not completed the age of eighteen years."

13. It shows that a person who has not completed 18 years of age is a minor. However, in the commentary on the text book Mulla, Principles of Mahomedan Law, 19th Edition, by M. Hidayatullah, it is stated as under:

"Age of majority under the Mahomedan Law:- According to the Islamic law, the minority of a male or female terminates when he or she attains puberty. Among the Hanafis and the Shia, puberty is presumed on the completion of the fifteenth year. Under the Majority Act (Sec. 3), minority cases on the completion of the eighteenth year, unless a guardian of the person or property or both of the minor has been or shall be appointed before the minor has attained the age of eighteen years, or the property of the minor is under the superintendence of a Court of Wards, in which case the age of minority is prolonged until the minor has completed the age of twenty-one years. Under the Mahomedan Law any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. But that law has been materially altered by the Indian Majority Act, and the only matters in which a Mahomedan is now entitled to act on attaining the age of fifteen years are: (1) marriage, (2) dower and (3) divorce. In all other matters, his minority continues until the completion at least

of eighteen years. Until then the Court has power to appoint a guardian of his person or property or both under the Guardians and Wards Act."

14. Thus, from the above, it is clear that when a person has attained puberty, when he or she has willingly contracted the marriage, it is a valid marriage under the Mohammedan Law.

15. I may quote with profit a Division Bench decision in the case of Md. Idris Vs. State of Bihar and Others, .

16. The Division Bench of the Patna High Court has observed as under:

"5. So far as the factum of marriage is concerned, I may say at the outset that in the instant case, it has not been disputed at any stage. From the order of the learned Sessions Judge, it does not appear that the petitioner disputed the factum of marriage. His only assertion since the very beginning was that she is below 15 years of age, and as such, she could not marry without the consent of her guardian. Even before this Court in the writ application there is no assertion that in fact there has been no marriage. This aspect of the matter has been considered by a Bench in the case of Mst. Bashiran v. Mohammad Hussain, AIR 1941 Oudh 284 wherein it was observed:

".....It is well settled that the Majority Act which fixes the age of 18 years, at which a minor becomes a major, exempt marriage and divorce. The result will be that respondent No. 5 on the relevant date may be minor under the Indian Majority Act, or within the meaning of Sec. 361 of the Indian Penal Code, but certainly she could have married without the consent of her natural guardian. The necessary corollary to this will be that whatever may be the fate of the criminal case, which has been lodged by the petitioner for prosecuting respondent No. 4 for kidnapping, after the marriage, respondent No. 4 will be deemed to be the husband, and as such, entitled to live with respondent No. 5. In such a situation, in my opinion, learned Sessions Judge has not committed any error in directing the release of respondent No. 5 saying that she was at liberty to live with respondent No. 4 whom she claims to have married."

17. The Bench has further observed as under:

"6. I have not been able to appreciate under what provision of law respondent No. 5 was taken in custody because she is not alleged to have committed any offence, and as such, her detention in custody was without any authority in law. We are informed that even today she has been kept in Bihar State [North] Care Home, Patna City-6 under some order passed either by the learned Magistrate or by the Sessions Judge subsequently. As she is not an accused in any case there is no justification for detaining her in any Care Home. She should be allowed to go with respondent No. 4 as directed by the learned Sessions Judge."

18. The aforesaid observations, in my view, completely support the submission advanced by Mr. Patel, the learned Advocate appearing on behalf of the applicant. The sum-total of the aforesaid discussion of Arts. 251 and 348 of the

Mohammedan Law is that for the purpose of contracting marriage, a person is considered to be major when he or she attains puberty and such person can contract marriage even without the consent of the guardian, if he or she is of sound mind and not a lunatic.

19. In absence of any evidence, puberty can be assumed on completion of the age of 15 years. (See Alimamad Mersha Shaikh Vs. State of Gujarat, .

20. However, the issue does not conclude over here. No doubt, according to the Mohammedan Law, the occurrence of puberty or attaining 15 years of age determines minority of the right of the girl to contract a marriage without the consent of the parents, but in my opinion, for the present purpose i.e. so far as Secs. 360 and 366 of the Indian Penal Code are concerned, regard must be only to the definition of minority under Sec. 3 of the Majority Act (9 of 1875).

21. Let me look into the provisions of the Majority Act, more particularly the Objects and Reasons:

INTRODUCTION

"During the British regime the mass of persons domiciled in India were roughly divided into: (i) Hindus, (ii) Muhammadans, (iii) European British Subjects, and (iv) persons to whom the Indian Succession Act applied. The ages at which persons belonging to these classes attain their majority were different according to the then prevalent laws. In the highly important matter of the age at which persons can enter into binding contracts with others and undertake responsibilities as majors, the law of the country was most confused and uncertain. To remedy this, the Indian Majority Bill was introduced in the Legislature.

STATEMENT OF OBJECTS AND REASONS

The mass of persons domiciled in this country may roughly be divided into: (1) Hindus, (2) Muhammadans, (3) European British subjects, (4) Persons to whom the Indian Succession Act applies.

In the present state of law, the ages at which persons belonging to these classes respectively attain their majority may be stated as follows:

1. By the Hindu sastras, except those prevailing in Bengal, the end of the sixteenth year is the limit of minority, in Bengal the end of the fifteenth year is deemed to be the limit of minority, according to the Hindu law as understood there.

By Bengal Regulation XXVI of 1973 and Madras Regulation V of 1804, the minority of Hindu proprietors of estates paying revenue to Government was extended, in case of such persons in each presidency respectively, to the end of the eighteenth year.

By Acts XL of 1858 and XX of 1864, for the care of the persons and property of

minors in the Presidency of Fort William in Bengal and in the Presidency of Bombay, respectively, it was enacted that, for the purposes of those Act, every person should be deemed to be a minor who had not attained the age of eighteen years. European British subjects are excluded from the purview of the Acts. The effect of those Acts clearly was, for the purposes of those Acts, to alter the Hindu law as to the age of majority in the cases of persons to whom the Acts applied, and in course of time the question was raised in the Calcutta High Court as to whether the Acts did not similarly affect the age of majority of Hindus subject to the ordinary original jurisdiction of that Court, and was decided in the affirmative. This opinion was not, however, accepted by other Judges of the same Court before whom the question arose and the matter having been by one of them expressed to be in a complicated and unsatisfactory state was the other day referred to a Full Bench of the Court, which decided that a Hindu resident in Calcutta, who had no property in the mofussil, attained his age of majority on the completion of his fifteen year, and refrained from deciding what was the effect of the Acts upon persons resident in Calcutta and possessed of property in the mofussil.

In Bombay, it has been decided that, notwithstanding Act XX of 1864, a Hindu resident in the mofussil came of age on attaining sixteen years, so as to be able to prosecute a claim by suit.

In a case which came before the late Sadr Diwani Adalat of Bengal, it was held that, according to the Jain law, majority begins on the completion of sixteen years.

2. By Muhammadan Law, the end of the fifteenth year, or the attainment of puberty, is the age of majority; but Muhammadans are, equally with Hindus and other British subjects in this country not being Europeans affected by the Regulations and Acts already noticed.

3. European British subjects not domiciled in this country come of age at twenty-one, and it has been held that they and their legitimate descendants, even though, domiciled in this country, do the same, so far as regards their capacity to contract. This opinion has been questioned in a recent case.

4. The class of persons to whom the Succession Act applies includes Europeans by birth or descent domiciled in British India, East Indians or Eurasians, Jews, Armenians, Parsis and Native Christians. The Succession Act defines a minor to be a person who has not completed the age of eighteen years, and defines "majority" to be the status of such a person. In the case of *Rollo v. Smith*, 1867 (1) Beng. LR (OC) 10, already referred to, Mr. Justice Mark by said that it would be carrying implication much too far to suppose that this definition was intended by the Legislature as an alteration of the age of majority for all purposes; and held that a person of one of the classes to whom the Act applies did not attain his majority, so as to have the full capacity to contract, until he attained the age of twenty-one. In the later case of *Archur v. Watkins*, 1872 (8) Beng. LR 372, Mr.

Justice Phear treated the question as still an open one, and held that, by the provisions of Act XL of 1858, a person of one of the classes to whom the Succession Act applies attained the age of majority, for all purposes of contract, at eighteen years. The ground of this decision so far as regards the effect of Act XL of 1858, was overruled in the subsequent decision of the Full Bench in *Mullick v. Mullick*; and the law respecting the age of majority of persons in this class, is, perhaps, in a more unsatisfactory state than even that relating to persons in the other classes.

Such being, briefly, the present state of the law, it is obvious that, in the highly important matter of the age at which persons can enter into binding contracts with others and undertake responsibilities as majors; the law of this country is most confused and uncertain. To remedy this the present Bill has been drawn. The alteration proposed by it in the Hindu and Muhammadan Laws, in cases now governed on this point by those laws, is not one which affects any principle of those laws touching the religion or conscience of those persons who are subject to them. The change, has already, in part, been made by the Regulations and Acts above-mentioned; and no objection has ever been made to the change thus effected.

To avoid, however, the possibility of any mistake on this point, it is expressly provided in the Bill that it is not to affect the capacity of any person to act in matters connected with marriage, dower, divorce and adoption. By their own laws Muhammadans and Hindus are empowered to act in these matters at an earlier age than that here fixed as the age of majority, and it is not intended to interfere with their capacity in these respects.

The Bill also provides that it shall not affect the religion or religious rites and usages of any class of Her Majesty's subjects or the capacity of any person who, before the commencement of the proposed Act, shall have attained majority under the law applicable to him.

It has been thought advisable to extend the Act to all persons, including European British subjects domiciled in British India. Were European British subjects excluded in all cases, it would be necessary for all persons dealing with them to ascertain whether they came within the legal definition of the term, an enquiry often difficult, and which would be most embarrassing were the exception extended, as in *Rollo v. Smith*, 1867 (1) Beng. LR (OC) 10, to all legitimate descendants, however remote, domiciled in British India, of European British subjects. The fourth Section states the law as it now stands."

THE MAJORITY ACT, 1875 (Act No. 9 of 1875)

[2nd March, 1875]

An Act to amend the law respecting the age of majority. WHEREAS, in the case of persons domiciled in India, it is expedient to specify the age of majority; It is hereby enacted as follows:-

Section 1: Short title-

This Act may be called the [***] Majority Act, 1875.

Local extent: It extends to the whole of India (except the State of Jammu and Kashmir); Commencement and operation and it shall come into force and have effect only on the expiration of three months from the passing thereof.

Section 2: Savings-

Nothing herein contained shall affect-

- (a) the capacity of any person to act in the following matters (namely) - marriage, dower, divorce and adoption;
- (b) the religion or religious rites and usages of any class of (citizens of India); or
- (c) the capacity of any person who before this Act comes into force has attained majority under the law applicable to him.

Section 3: Age of majority of persons domiciled in India-

(1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

(2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day.

Section 4: Age of majority how computed-

In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of Sec. 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of Sec. 3, at the beginning of the eighteenth anniversary of that day.

Illustration

(a) Z is born in India on the first day of January, 1850, and has an Indian domicile. A guardian of his person is appointed by a Court of Justice. Z attains majority at the first moment of the first day of January, 1871.

(b) Z is born in India on the twenty-ninth day of February, 1852, and has an Indian domicile. A guardian of his property is appointed by a Court of Justice. Z attains majority at the first moment of the twenty-eighth day of February, 1873.

(c) Z is born on the first day of January, 1850. He acquires a domicile in India. No guardian is appointed of his person or property by any Court of Justice, nor is he under the jurisdiction of any Court of Wards. Z attains majority at the first moment of the first day of January, 1868."

22. I shall now look into the provisions of the Secs. 361, 363 and 366 of the

Indian Penal Code.

"361. Kidnapping from lawful guardianship:- Whoever takes or entices any minor under (sixteen) years of age if a male, or under (eighteen) years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation:- The words "lawful guardian" in this Section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception:- This Section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

363. Punishment for kidnapping:- Whoever kidnaps any person from (India) or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.:- Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid."

23. An interesting question fell for my consideration of a Division Bench decision of the Madras High Court in the case of Abdul Azeez Vs. Pathumma Bi, . The question of law which fell for decision in that case was, whether a muslim woman who is a major according to her personal law, but a minor according to the provisions of the Majority Act, is entitled to bring a suit for dissolution of a marriage without being represented by the next friend.

24. The Division Bench, after discussing the provisions of the Civil Procedure Code, Majority Act and the provisions of the Mohammedan Law, made the following observations:

"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 or in the General Clauses Act. The Majority Act, (9 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 Sec. 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 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. Sec. 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 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 Sec. 2(a) of the 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. Kairhirapoloil*, 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 Majority Act had no application because of the provisions of Sec. 2(a) of that Act. The lower Court was of the opinion 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 Sec. 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 Sec. 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 Vohra Vs. Bai Fatma*, 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 Sec. 2(a) of the 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 Umah v. Kaihirapoloil*, 3 Mad. 248. Akram, J., sitting alone took the same view in *Naksetan Bibi Vs. Habibar Rahaman Mandal*, . In his opinion, the words "to act" in Sec. 2(a) of the 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 Vohra Vs. Bai Fatma*, . The attention of the learned Judge was invited to the decision in *Ithayi Umha v. Kaihirapoloil*, 3 Mad. 248, but he purported to distinguish that decision by observing that was a case for recovery of stridhan also and clearly would not be covered by Sec. 2 of the 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. Kaihirapoloil*, 3 Mad. 248 . There is nothing in the reasoning of Madgavkar, J., in *Ahmed Suleman Vohra Vs. Bai Fatma*, nor of Akram, J., in *Naksetan Bibi Vs. Habibar Rahaman Mandal*, which commends itself to us. On the plain reading of Sec. 2(a) and 3 of the 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 Sec. 3 of the 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."

25. I am of the view that so far as the offence under the Indian Penal Code is concerned i.e. of the offence under Sec. 361, the girl could be termed as a minor, although under the Mohammedan Law she may have a right to contract the marriage on attaining 15 years of age or puberty, as the case may be, without the consent of her parents. To take the view that the parties would be solely governed by the provisions of the personal law ignoring the provisions of the Majority Act would be extremely dangerous. In a given case, a muslim girl might attain puberty even at the age of 12 or 13, in such circumstances, it cannot be said that she is a major, and therefore, no offence of kidnapping as defined under Sec. 361 of the Indian Penal Code is committed.

26. This brings us to the question, whether an offence under Sec. 363 could be spelt out in the background of the instant case.

27. Section 363 of the Indian Penal Code contemplates two kinds of kidnapping -
(a) kidnapping from India, and

(b) kidnapping from lawful guardianship. We are not concerned with the offence of kidnapping from India. Section 361 defines kidnapping from the lawful guardianship. It provides as follows: "Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Some observations would not be out of place. In order to come within the mischief of that Section the accused must have either taken away the minor girl or must have enticed the minor girl out of the keeping of her lawful guardian without the consent of such guardian. The two expressions "taking" and "enticing" evidently have two different connotations. But both the expressions call for some positive step having been taken by the accused to remove the girl from the lawful custody of her guardians. Neither of the Sections would have any application if the girl has, of her own accord, come out of the custody or come out of the keeping of her lawful guardians, and if it is thereafter, that the accused had gone with her to some place. To illustrate, the accused may go to the house of the girl and may lift her from her house. He no doubt commits the act of kidnapping. But if the girl is of the age of understanding and has left her parental home of her own accord and meets some person and requests him to accompany her to some place for her safety, the person accompanying the girl is not guilty of kidnapping her. There may be cases in which the girl might leave the custody of her guardian

and might in fact go to a third person and prevail upon him to take her to some distant place. In such cases, even if the person knew that the girl is a minor girl and knew the names of her parents, still if he has not initiated the girl's coming out of the house, mere passive acquiescence on his part evidenced by his accompanying the girl to places would not necessarily spell the offence of kidnapping on his part. It cannot be said in such cases that it is the accused who has "taken away" the girl from out of her parents' custody. If any authority is necessary for this proposition the same is to be found in the judgment of the Supreme Court in the case of *S. Varadarajan Vs. State of Madras*, . In that case the girl who had reached the state of understanding had candidly admitted that on the morning of October 1st, she herself telephoned to the accused to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. This is what the Supreme Court held further in that case in this context at page 36 of Cri.L.J.;"???"...

"Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's Office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him....."

28. The position in the instant case is not materially different. In the instant case, Reshambanu is admitting in so many words that she had accompanied the applicant on her own free-will and volition and since she was in love with the applicant and the applicant also loved her, they decided to get married, and accordingly, got married at the Ajmer Sharif.

29. In my view no case is made out to even prima facie show that Reshambanu had received a promise or assurance or any tempting offer from the applicant by virtue of which she was forced to leave her parental home. There is, thus, nothing to even prima facie show to the Court the "taking of the girl by the

accused, the evidence about his "enticing" her away is equally absent. If this is so, there is no kidnapping of the girl, and hence, the question for application of Sec. 363 of the Indian Penal Code does not arise.

30. In my view, when no offence is constituted, the Police should not be allowed to continue with the investigation. As on today, Reshambanu is happily residing at her matrimonial home with her husband i.e. the accused before me. In the result, this application is allowed. The First Information Report being CR. No. I-20 of 2013 lodged before the Dholka Police Station is hereby ordered to be quashed. All consequential proceedings pursuant thereto also stand terminated. Rule is made absolute.