

2020 C L C 1691

[High Court (AJ&K)]

Before Chaudhary Khalid Yousaf, J

HALEEMA BIBI----Appellant

Versus

AZEEM and 2 others----Respondents

Family Appeal No.41 of 2019, decided on 29th April, 2020.

(a) Azad Jammu and Kashmir Family Courts Act, 1993 (XI of 1994)---

----S. 5 & Sched.---Contract Act (IX of 1872), Ss.19 & 19-A---Suit for jactitation of marriage---Voidability of agreement of marriage without free consent---Power to set aside contract induced by undue influence---Scope---Plaintiff assailed order passed by Judge Family Court whereby her suit for jactitation of marriage was dismissed and the marriage was dissolved on the basis of khula---Validity---Plaintiff had, soon after the alleged nikah ceremony, went to the police station and lodged a complaint against her father and her alleged bridegroom, which strengthened the argument that her signature and thumb impression were taken with undue influence---Consent obtained by coercion or undue influence did not validate the marriage---Witnesses of the alleged nikah ceremony were not produced before the court---Appeal was accepted and the nikah was declared to be null and void.

(b) Azad Jammu and Kashmir Family Courts Act, 1993 (XI of 1994)---

----S.5 & Sched.---Contract Act (IX of 1872), S.19---Marriage---Concept---Voidability of agreement without free consent---Scope---Marriage is a civil contract based on mutual consent on the part of a man and woman---Solemnization of marriage requires Ijab-o-kabul, that there should be a proposal made by or on behalf of one of the parties and an acceptance of the proposal by or on behalf of the other, in the presence of two male or one male and two female witnesses, as the case may be, who must be sane adult---Ijab-o-kabul should be without fear or undue influence or fraud---Marriage without a free consent of both the parties would not be legally valid---Consent obtained by coercion or undue influence from any of the parties would make the marriage invalid.

(c) Azad Jammu and Kashmir Family Courts Act, 1993 (XI of 1994)---

----S.5 & Sched.---Contract Act (IX of 1872), S.19---Marriage---consent of woman---Necessity---Scope---Guardian of woman---Responsibility---Scope---Voidability of agreement without free consent---Scope---Guardians are enjoined by Islam to get their daughters married after getting their consent---Consent of a woman is necessary; she cannot be compelled to enter into a marriage contract without her free will and consent---If a girl is married to a person who is not of her

choice and girl signs the nikahnama unwillingly by force or fear of her guardian, the same cannot be termed as valid marriage, because guardian's consent is no substitute for the girl's consent.

Malik Shahnawaz Khan for Appellant.

Raja Masood Ahmed Khan for Respondents.

ORDER

CHAUDHARY KHALID YOUSAF, J.----The captioned appeal has been filed against the judgment and decree of Additional District Judge/Judge Family Court Kotli dated 30-3-2019, whereby, suit filed by plaintiff-appellant, for jactitation of marriage was dismissed and marriage was dissolved on the ground of Khulla.

The necessary facts forming the background of instant appeal are that Mst. Haleema Bibi, appellant herein, filed a suit for jactitation of marriage against defendant-respondent No.1 herein, to restrain him from pretending himself as her husband, before the Judge Family Court Kotli on 08.09.2016, stating therein, that her right arm was injured, her father, Muhammad Anwar respondent No.2 brought her in DHQ Kotli for treatment, thereafter respondents Nos. 2 and 3 forcibly abducted her to an unknown place and forced her to enter into a Nikkah with respondent No.1, Muhammad Azeem. It has been further alleged that on her refusal they forcibly take her signature and thumb impressions on Nikkahnama without her consent. On the same day i.e. 17.08.2016, the plaintiff lodged a written complaint against the defendants-respondents herein therefore; an F.I.R was registered against the respondents on 25.08.2016. On the other hand respondent No.1, Muhammad Azeem, also filed a suit for restitution of conjugal rights before the same Court alleging therein that she is his lawfully wedded wife and on inducement of her relatives she filed the suit for jactitation of marriage.

On filing of the suits parties were summoned who, resisted the suits by filing written statements pro and contra. The learned Judge Family Court Kotli consolidated both the suits and proceeded in the suit for jactitation of marriage. The parties were directed to lead evidence. The learned Family Judge while concluding the suits dismissed the suit filed by Muhammad Azeem for restitution of conjugal rights whereas suit filed by the Mst. Haleema Bibi appellant herein, was dismissed to the extent of jactitation however marriage was dissolved on the basis of Khulla in consideration of 4 tola gold ornaments vide its judgment and decree dated 30.03.2019; hence, this appeal.

Malik Shahnawaz Khan, Advocate, learned counsel for the plaintiff-appellant, Haleema Bibi; submitted that the Judge Family Court committed an illegality while dismissing the suit for jactitation of marriage. Learned counsel further contended that respondents forcibly got signatures of plaintiff-appellant on Nikkahnama without her free will which has no legal effect. Learned counsel further contended that defendant-respondent herein failed to prove that dower was given to her but

learned judge Family Court wrongly passed a decree of Khullah in consideration of 4 tola gold ornaments which is not sustainable. The learned counsel further contended that the appellant proved her case through cogent and convincing evidence but the court below passed the impugned judgment in capricious manner. Lastly, he prayed that impugned judgment and decree may be set-aside and decree for jactitation of marriage may also be passed against the defendant-respondent No.1.

Conversely, Raja Masood Khan, Advocate, learned counsel appearing on behalf of the respondent No.1 argued that the learned Judge Family Court has correctly appreciated the evidence of the parties and rightly dissolved the marriage on the ground of Kbula in consideration of 4 tola gold ornaments. He further contended that plaintiff-appellant is sui-juris and married of her own choice, and free will in the presence of witnesses, valid Nikkahnama is on record. He further submitted that she filed the present suit on inducement of her relatives. He finally prayed for dismissal of appeal.

I have heard the learned counsel for the parties and gone through the record of the case with utmost care.

At very outset it may be observed that marriage is a civil contract based on mutual consent on the part of a man and woman. The solemnization of marriage requires Ijab-o-Kabul that there should be a proposal made by or on behalf of one of the parties and an acceptance of the proposal by or on behalf of the other, in the presence of two male or one male and two female witnesses, as the case may be, who must be sane and adult. However, this Ijab-o-Kabul, should be without any fear or undue influence or fraud. Marriage without a free consent of both the parties, would not be legally valid. Any consent obtained by coercion or undue influence from any of the parties would make the marriage invalid.

So far as, the contention of learned counsel for respondent No. 1 that a valid Nikkah was solemnized on 17.08.2016 in the presence of witnesses and Wali (father) of the plaintiff is concerned. It is pertinent to mention here that guardians are enjoined by Islam to marry their daughters after getting their consent, consent of a woman is necessary; she cannot be compelled to enter into a marriage contract without her free will and consent. If a girls is married to a person who is not of her choice and girl signed the Nikkahnama unwillingly by the force or fear of her father, the same cannot be termed as valid marriage, because father's consent is no substitute for the girl's consent. In the instant case it is evident from record that soon after the alleged Nikkah Ceremony Haleema Bibi plaintiff straightaway went to the police station and lodged a complaint against her father and alleged bridegroom respondent No.1, which strengthen the argument of the learned counsel for plaintiff-appellant herein that the signature and thumb impressions of the plaintiff are taken with undue influence of her father, which is not permissible under law. Consent obtained by coercion or undue influence would not validate the marriage. Furthermore, perusal of alleged Nikkahnama reveals that four persons

namely, Muhammad Kabir, Muhammad Tariq, Muhammad Ashiq and Nisar Hussain Shah are enlisted in it as witnesses of alleged Nikkah ceremony and their names are also included in the list of witnesses placed on record by the respondent No.1 herein but none of them appeared before the Court in support of alleged Nikkah ceremony.

So far as the contention of the learned counsel for respondents that the plaintiff filed the present suit on inducement of her relatives is concerned. Perusal of the record reveals that Nikkah was alleged to be held on 17.08.2016, on the same day the alleged bride plaintiff-appellant herein, went to the police station and lodged a complaint against her father respondent No.2 along with the respondent No.1 and the same was indorsed in "Roznamcha", ultimately an F.I.R No. 216/16, under section 11/ZHA, 34, 502(2), APC was registered against the respondents herein, hence, this contention of the learned counsel for respondent is hereby repelled.

In the light of above discussion I am of the view that the alleged Nikkah is apparently performed against the consent of the plaintiff-appellant herein, which is basic essential of the valid Nikkah therefore; I accept the instant appeal by setting aside the impugned judgment and decree dated 30.03.2019 and declared the Nikkah null and void. Consequently, the suit for jactitation of marriage filed by the Haleema Bibi appellant herein, is hereby decreed.

SA/15/AJK(HC) Appeal accepted.

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