* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **RSA 3/2012**

Reserved on: 15.03.2016
Date of decision: 23.03.2016

RAISUDDIN ..... Appellant
Through: Mr. Pankaj Prasad, Advocate

versus

GULSHAN ..... Respondent
Through: Mr. Mohd. Abid, Advocate.

\+ **RSA 4/2012**

RAISUDDIN ..... Appellant
Through: Mr. Pankaj Prasad, Advocate

versus

GULSHAN & ANR. ..... Respondents
Through: Mr. Mohd. Abid, Advocate.

CORAM:
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR , J.

1. Appellant Raisuddin in RSA Nos.3/2012 and 4/2012 has challenged the judgment and decree of the first Appellate Court dated 08.11.2011 in RCA Nos.9/2009 and 2/2010 whereby the judgment of the Trial Court in Suit No.431/2006, lodged at his instance for restitution of conjugal rights which was dismissed by the Trial Court and Suit No.432/2006, filed by the respondent seeking declaration that

the “nikahnama” regarding “nikah” between him and the respondent is null and void and permanent injunction, restraining the appellant from making any claims towards the respondent in the capacity of husband, which too was dismissed by the Trial Court has been set aside and the suit of the respondent (Suit No.432/2006) has been decreed whereas suit of the appellant (Suit No.431/2006) has been dismissed.

2. In order to appreciate the facts of the two suits lodged by the appellant as well as the respondent respectively, it would be first necessary to set out in brief the respective cases of the appellant and the respondent.

3. The respondent, Mst.Gulshan filed a suit (Suit No.432/2006) on 09.06.2003 against the appellant seeking the nikahnama between them as null and void document. The appellant in turn, filed a suit (Suit No. 431/2006) on 14.08.2003 for restitution of conjugal rights.

4. Both the suits were amalgamated by order dated 02.03.2005 of the Trial Court.

5. The claim of the respondent as per her plaint is that she, after passing secondary school examination in 1996, had been pursuing her graduation course whereas the appellant who claims himself to be her husband is an aged person and is involved in the vocation of selling clothes on pavement. The appellant came to know the respondent when she took tuition classes of the appellant’s nephew and the niece. The appellant fell in one sided love with her without any corresponding concurrence by the respondent. The respondent claims to have been persistently stalked for about two years and the appellant even tried to create troubles for her by informing her employer that

she was married to him. The respondent completely denied about any nikah having taken place and alleged that nikahnama is illegal, having no forbearance in law. A categorical assertion has been made by the respondent in her complaint that no relationship ever existed between her and the appellant. Under the aforesaid circumstances, Suit No.432/2006 was filed for declaring the so called "nikahnama" as a null and void document and for restraining the appellant from making any claims about his having wedded her.

6. The aforesaid suit of the respondent was contested by the appellant with the plea that nikah had taken place with the consent of the respondent on 02.04.2001 when the respondent was a major. It was averred in the written statement by the appellant that the mother of the respondent was in debt of him and while the respondent gave tuitions to his nephew and niece, he fell in love with the respondent and decided to marry her. Because the marriage between the appellant and the respondent would not have been acceptable to the mother of the respondent, the respondent had agreed to join the appellant as his wife later after convincing her mother that she has married the appellant of her own choice. It was also the case of the appellant that at the insistence of the mother, the respondent has preferred the aforesaid suit.

7. The respondent in turn has totally denied all such assertions of the appellant.

8. Suit No.431/2006, as stated above, was instituted at the instance of the appellant wherein the same story was narrated which finds mention in the written statement in the suit filed by the respondent. It

was alleged by the appellant in his suit that after coming to know of the relationship between the appellant and the respondent, the mother of the respondent assaulted the respondent and forced her to file the suit for declaration and injunction.

9. Since both the suits were taken up together, the Trial Court, on the basis of pleadings of both the suits, framed the following issues on 07.04.2004 and 20.01.2004. They are as hereunder:-

(i) Whether Mst. Gulshan is entitled to a decree of declaration against Sh.Raisuddin, declaring the nikahnama as null and void (OP on Mst.Gulshan)?

(ii) Whether the alleged nikahnama in question is relevant (OP on Mst.Gulshan)?

(iii) Whether Mst.Gulshan is entitled to permanent injunction against Sh.Raisuddin as prayed for (OP on Mst.Gulshan)?

(iv) Whether Sh.Raisuddin is entitled to a decree of restitution of conjugal rights against Mst.Gulshan (OP on Sh.Raisuddin)?

(v) Relief.

10. The appellant and the respondent examined themselves as DW-1 and PW-1 respectively. Apart from the deposition of the appellant and the respondent, both also filed documents in support of their claims.

11. The Trial Court on the basis of the evidence came to the conclusion that "*nikah*" had taken place between the appellant and the respondent and the nikahnama was a valid document. Thus issues Nos.1, 2 & 3 referred to above were decided in favour of the appellant.

12. However, the Trial Court, taking into account, the logic that nobody could be forced to fulfill the matrimonial obligation as also relying on the fact that marriage between the appellant and the respondent was never consummated nor was there any animus of continuing with the matrimonial obligation on the part of the respondent, decided the issue whether the appellant was entitled to a decree for restitution of conjugal rights, in the negative. Thus for all practical purposes, the Trial Court dismissed both the suits.

13. As against the aforesaid composite judgment of the Trial Court, the appellant preferred RCA No.9/2009 whereas the respondent filed RCA No.2/2010. Both the appeals were taken up together and a common judgment dated 08.11.2011 was delivered by the first Appellate Court holding that the Trial Court was in error in dismissing the suit of the respondent and held that the appellant failed to establish any valid marriage between him and the respondent and that the nikahnama (Exh.PW-1/5) was not a valid piece of document having any forbearance of law. Simultaneously, the first Appellate Court upheld the judgment of the Trial Court with respect to the suit filed by the appellant for restitution of conjugal rights and dismissed the suit of the appellant.

14. The appellant, therefore, has preferred the present appeal Nos.3/2012 and 4/2012 against the aforesaid judgment of the first Appellate Court.

15. For deciding whether a valid nikah took place between the appellant and the respondent on 02.04.2001, it is necessary to refer to the deposition of the respondent.

16. In her deposition before the Trial Court as PW-1, the respondent has stated following facts:- (a) she is a graduate; (b) she is working as a merchandiser for the last five years; (c) she was born in Meerut; (d) she denied that she was ever married to the defendant; (e) she admits photographs (Exh.PW-1/D1 to 1/D5); (f) she did not recognize the photograph of a lady who was marked A in Exh.PW-1/D5 and submitted that she was not her relative; (g) she has denied of any business relationship between her mother and the appellant; (h) she denies that the suit was filed at the instance of her mother; (i) she is not certain whether she signed the document namely nikahnama on 02.04.2001 as she was under depression at that point of time and that the assertion of the appellant that the nikah was solemnized before two witnesses namely Mohd.Sultan and Mohd.Rais as well as the Wakil, Maqbool Ahmed and the Qazi Mohd. Ghayas is totally wrong; (j) the defendant has completely denied about any feast having taken place on the alleged date of nikah and clearly deposed that she earned Rs.6500/- per month at the time of deposing before the Trial Court.

17. The appellant, on the other hand, in his evidence has stated that though nikah took place between him and the respondent but there was no "rukhsati" as the respondent had promised to attend the matrimonial home after convincing her parents. The appellant has candidly accepted that he never stayed with the respondent after the marriage and that marriage was never consummated. The marriage had taken place at the house of the Qazi in Katra Jambe, Daryaganj, Delhi. The parents of the appellant, though aware of the marriage, did not attend the marriage as the defendant wanted complete secrecy. The

appellant has also expressed his ignorance that at the time of nikah, the respondent was earning Rs.6500/- per month. The assertion of the respondent that the appellant sold clothes on the pavement was vehemently denied and the appellant submitted that for some time he was in job on a monthly salary and later he set up a shop of cloth of his own. The appellant admitted the presence of some of the relatives at the time of nikah including the daughter of the mausi of the respondent.

18. The deposition of the appellant and the respondent respectively do make it very clear that though, the appellant claims that nikah had taken place but secrecy was maintained and even his parents did not attend the marriage and that after the marriage, if at all it had been performed, the appellant and the respondent never stayed together and the marriage was never consummated.

19. Marriage (nikah) amongst muslims is in the nature of a contract or "solemn pact" (misaq-e-ghaliz) between persons of two opposite sexes, soliciting each other's consent for company, making it a lawful contract (aqd). The concept is somewhat different from Hindu law where marriages are regarded as sacrament. There is a difference of opinion whether marriages in muslims are mere civil contracts. The votaries of the theory of marriage being more than a civil contract base their opinion on the fact that the Phophet described nikah as his "*Sunnat*". Only the form of Muslim marriage is contractual and non ceremonial but so far as the concept of marriage is concerned, it is something more than a contract.

20. Under Muslim law various conditions and requirements have been laid down relating to marriage but there is no specific insistence on full compliance of the aforesaid conditions and requirements. The marriage is stated to be lawful (Sahih) if it is contracted in compliance with all legal requirements; unlawful (Ghayr Sahih) i.e. marriage which is solemnized in violation of one or other of the legal requirements; Void (Batil) meaning a marriage, though solemnized but not legally recognized and; irregular (Fasid) i.e. a marriage which is unlawful (Ghayr Sahih) but not void (Batil).

21. With respect to the capacity to marry what is not in dispute is that a Muslim male can marry a Muslim female, if he is competent to marry with or without the consent of a third person or a marriage guardian. As regards the basic attributes of the legal competence to marry, persons must be of a sound mind and must have attained puberty (Bulugh). Some disputes do occur with respect to the evidence of puberty, but under the Muslim law, in the absence of any proof of the same, there is a presumption of puberty of a person having completed 15th year of his life. Though the earliest age of puberty for a boy is generally 12 years and for a girl is generally 9 years.

22. Like any other marriages if the consent for marriage is obtained by fraud, the marriage will be void but it could be ratified expressly or impliedly by consummation of the marriage. However, forced consummation would not amount to ratification.

23. Strictly speaking, under the Muslim law there is no requirement of a particular ceremony of solemnization but such ceremonies are not specifically barred as well. But there are some basic tenets of a

complete matrimonial contract. This concept would include a proposal of marriage *Ijab* and the acceptance of the marriage which in technical term is called *Qubul*. These are the two basic concepts without which a marriage cannot be said to have been performed. The *Ijab* and *Qubul* i.e. offer and acceptance has to be reasonably certain for a completed transaction. Any confusion or inchoate transaction which may convey a mere intention or promise to marry would not at all be called a proper offer of marriage or acceptance of marriage.

24. Such offer and acceptance i.e. *Ijab* and *Qubul* is required to be made in the presence and hearing of witnesses (shahadat) who must be Muslims and must be competent to contract their own marriages. The witnesses must hear the *Ijab* and *Qubul* with clarity. The *Ijab* and *Qubul* must be made in the same sitting *(*majlis-e-wahid*)* signifying continuity of transaction. If *Ijab* and *Qubul* are performed in a legal manner, marriage contract is said to be completed.

25. The practice of nikah is obligatory and can take place either in a mosque, a public place or at the bride parents' residence. The normal practice is that confirmation of the bride's consent to marriage would be taken by her agent (*vakil*) in the presence and hearing of the witnesses, relatives and friends. The consent thereafter is given by the bride by words, signs or even silence. Affirmation of the consent of the bride is then made by the *vakil* and the witnesses before the Qazi. The Qazi thereafter recites *khutba-e-nikah* which are basically extracts from Quran and Hadis relating to importance of marriage and providing guidelines for a happy married life. Thereafter, there is feast which is arranged by bride side and later at the bridegroom's

place, another feast takes place which is called *Walima.* However, as stated earlier, none of these practices are customary procedures of marriage.

26. Under Muslim Law the marriage contract is not required to be reduced in writing and an oral marriage is also valid. Lately, the practice of preparation of nikahnama has gained ground.

27. Marriage has been defined and explained under Section 250 & 252 of the Mulla's Principles of Mahomedan Law. It reads as hereunder:-

> *"250.Marriage (Nikah) is defined to be a contract which has for its object the procreation and legalizing of children.*
>
> *252. Essentials of a marriage: It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential."*

28. With respect to the capacity for marriage, Section 251 of the Mulla's Principles of Mahomedan Law states that every Mahomedan of sound mind, who has attained puberty, may enter into contract of marriage. Thus from the aforesaid definitions it would appear that a marriage is performed for the purposes of procreation and, therefore,

consummation is an important aspect of marriage. The essentials of marriage (Section 252 quoted above) include express proposal and acceptance at one meeting. Any written or any religious ceremony, not being an essential attribute of a valid marriage, would not be an evidence in proof of any marriage which is in dispute.

29. In case of a dispute about a marriage, the same shall be presumed, in the absence of any direct proof from a) prolonged and continual cohabitation as husband and wife; b) the fact of the acknowledgement by the man of the paternity of the child born to a woman or the fact of acknowledgement by the man of the woman as his wife (refer to Section 268 of Mulla's Principles of Mahomedan Law). However, the presumption would not apply if the conduct of the parties is inconsistent with the relationship of husband and wife.

30. With the aforesaid principles of Mahomedan Law in mind, if the evidence of the appellant and the respondent is analyzed it would appear that the nikahnama (Exh.PW-1/5) which may have been signed by the respondent would not be a sufficient proof of the fact of nikah having been held between the appellant and the respondent. The photographs, obviously, would also not be of any relevance as part of proof of the factum of marriage. What is of importance is that in case there was an offer *(Ijab)* and acceptance *(Qubul)* by the appellant and the respondent respectively, the only proof of the same would lie in the mouth of the witnesses who might have witnessed such contract having been completed. If at all, the assertion of the appellant is correct that nikah took place on a particular date, it ought to be proved; the onus lying on the appellant to bring in evidence. In the

absence of any such evidence regarding the marriage and the circumstance under which the photographs with nuptial garland was taken, factum of marriage may not be proved. Even if it is presumed that the respondent was competent to marry because of her having attained the age of puberty, the evidence with respect to her express acceptance of the marriage is lacking. If the deposition of the appellant is that the respondent agreed to join the matrimonial home later is accepted to be true, then it would only amount to a promise to marry as the marriage according to the Mahomedan law is for the purposes of procreating and legalizing of children.

31. Admittedly, parties have not stayed together and there has not been any consummation of the marriage. The nikahnama (Exh.PW-1/5) even if signed by the respondent and the photographs showing some kind of a wedding between the appellant and the respondent would not be any proof of the nikah as there is no witness who has been called upon by the appellant to prove such nikah which is one of the essential attributes of marriage and no marital ceremony is necessary under the Mahomedan law.

32. Thus if the marriage itself is doubtful, the suit of the appellant for restitution of conjugal rights is bound to fail. Even if the marriage would have been say for instance, ratified by either of the parties, what the Courts would be required to see is whether such ratification is by way of express intention or acceptance or without any coercion or force. In such circumstances, the respondent cannot, even if the marriage is ratified, or held to be Sahih, be forced to cohabit with the appellant.

33. Thus seen from all angles, there is no reason why the judgment and decree of the first Appellate Court be interfered with.

34. No substantial question of law has been raised by the appellant.

35. Both the second appeals are, therefore, dismissed but without cost.

ASHUTOSH KUMAR, J

MARCH 23, 2016
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