PRIVY COUNCIL.

SADAKAT HOSSEIN v. MAHOMED YUSUF.

1883
P. C.*
December 6, 7.

[On appeal from the High Court at Fort William in Bengal.]

Mahomedan Law—Legitimation of offspring by acknowledgment.

The acknowledgment and recognition of a natural son by a Mahomedan as his son gives him the status of a son capable of inheriting as a legitimate son, unless certain conditions exist.

Mahomed Azmat Ali Khan v. *Lalli Begum* (1) referred to.

Whether the offspring of an adulterous intercourse can be legitimated by any acknowledgment is an open question.

APPEAL from a decree of the High Court (3rd June 1880), reversing a decree of the Subordinate Judge of the Sarun district.

This was an appeal in one of two suits, in both of which there were decrees made by the High Court against the appellant. He was the son of Kalb Ali, a Shia Mahomedan of the Sarun district, deceased, who left, besides this son, Sadakat Hossein, two daughters also, named Khairun Nissa and Saskimun Nissa, the latter of whom was the mother of, and died before Amir Hossein, to whose share the present litigation related. Amir Hossein, the appellant's sister's son, died in 1866, leaving him surviving a grandmother, Bibi Sadra, his aunt Khairun Nissa, and his uncle, this appellant. He left no other issue than a son, Mahomed Selim, born of a woman who had been in an inferior station in his household. Whether Mahomed Selim had been legitimated by his father's treatment of him was the question on this appeal.

Bibi Sadra died in 1869, and her estate devolved on this appellant, who also succeeded to the share of his sister, Khairun Nissa, she dying childless a few months after the grandmother. The appellant thus became entitled, unless the rights of Mahomed Selim as a legitimate son should prevail, to the whole share which had belonged to Amir Hossein, as well as to the shares of his mother and sister. Mahomed Selim, on attaining his majority

* *Present:* Lord FITZGERALD, Sir R. P. COLLIER, Sir R. COUCH, and Sir A. HOBHOUSE.

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in 1877, applied for "dakhil kharij" of the revenue-paying estates which his father had possessed. This was opposed by the appellant.

On the 17th July 1877 Mahomed Selim executed a deed of sale transferring to Mahomed Yusuf five villages, part of the estate which he claimed to have inherited from Amir Hossein; and at the end of the same year Mahomed Yusuf brought a suit to recover them, that being the suit in which the present appeal was preferred. For all the rest of the villages belonging to Amir Hossein's estate, Mahomed Selim himself had already instituted a suit against Sadakat Hossein. Both suits raised the same question, except that, besides the legitimacy of Mahomed Selim, the right of the plaintiff to sue in Mahomed Yusuf's suit was questioned. This objection was allowed by the Subordinate Judge, though afterwards in appeal held untenable. The Subordinate Judge, giving judgment in Mahomed Selim's suit, on the question of his right to inherit, decided in his favor. The Judge found that there had been a marriage between the plaintiff's mother and Amir Hossein that the plaintiff was the begotten son of the latter, and had been treated by him as his legitimate son.

On appeal a Divisional Bench of the High Court (GARTH, C.J., and MITTER, J.), after examining the evidence, stated grounds for holding that Mahomed Selim had been legitimated by treatment, and concluded thus:

"For these reasons we are of opinion that the plaintiff is the son begotten of Amir Hossein's body, and that during Amir Hossein's lifetime he was always treated as his legitimate son. It has been held by the Privy Council, that from such a uniform course of treatment, an acknowledgment of legitimacy under the Mahomedan law may fairly be inferred; and having regard to the circumstances set forth above, such inference in this case seems to us to be just and proper. (*See Ashrufood Dowlah Ahmed Hossein* v. *Hyder Hossein Khan* (1).

"The plaintiff, therefore, though born out of wedlock, was legitimated by this acknowledgment, and is entitled to succeed to the property left by Amir Hossein as his legitimate son.

(1) 11 Moo. I. A., 94.

"In this view of the case, it is not necessary to decide whether Mussumat Domni had been, as alleged by the defendant, married to Jummun or not.

"The appeal will be dismissed with costs."

The amount, or value, of the subject-matter in each of the suits being less than Rs. 10,000, while, taken together the amounts in both exceeded it, upon a petition by Sadakat Hossein for leave to appeal to Her Majesty in Council, and for a certificate that the case fulfilled the requirements of s. 596 of Act X of 1877, the order of the High Court admitting the appeal was preceded by a judgment (PONTIFEX, J.) in which it was pointed out that a question of law might be said to have arisen. The point was thus stated in the judgment (28th January 1884):—

"Now, in Selim's suit, the first Court held that Amir Hossein, was married to Domni, and that Selim was his legitimate son. The High Court on appeal held that the marriage was not proved but that Selim was the son of Amir Hossein by Domni, and had been acknowledged by Amir Hossein, and was therefore entitled to his property. It appears, however, to have been alleged by the appellant that Domni, with whom Amir Hossein had been living, was in fact the wife of somebody else, and thus incapable of being the wife of Amir Hossein. That question does not appear to have been gone into by this Court. This Court considered that the finding that Domni had a son by Amir Hossein, who was treated by Amir Hossein as a son, was sufficient to give that son a title. But referring to the case of *Khajah Hidayut Oollah* v. *Roy Jan Khanum* (1), it appears that a substantial and at least arguable question of law may exist. At page 318 there is a quotation from Macnaghten's book, which tends to show that if the woman was married to some other person, then her son could not be legitimated because she was incapable of being the wife of Amir Hossein. That question refers to the Sunni law, and the parties here are Shiahs. But this view of the law seems also to apply to Shiahs as appears by a passage in Baillie's Digest of the Imamia Law, page 289. The decision of the High Court in Selim's case, of course, also governed the other case of Mahomed Yusuf. I, therefore, think that there is

(1) 3 Moo. I. A. p. 295.

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a substantial question of law involved in these cases, and I admit the appeals. But as it is not expedient that both appeals should proceed together before the Privy Council, I think the appeal forwarded should be that one in which Mahomed Yusuf is a respondent, as in that all questions in dispute may be decided. The whole record, however, should be translated and transmitted to the Privy Council, and the other appeal should stand over until further orders."

Mr. *J. F. Leith, Q.C.*, and Mr. *R. V. Doyne* appeared for the appellant.

It was submitted that the title of Mahomed Selim to succeed to his father's estate, as his legitimate son, failed; because the evidence showed that there had been a marriage, before his birth, between his mother Domni and one Jummun, which was subsisting at the time of her connection with Amir Hossein. It was not competent to the latter to give to the offspring of an adulterous connection the status of a legitimate son. He had not, however, on the evidence, shown any real intention to do so.

With reference to that part of the judgment of the High Court in which that Court declined to deal with the question whether or not there had been a marriage between the mother, Domni, and Amir Hossein, the father, it was argued that as legitimation of a son by evidence of treatment, or acknowledgment, took its origin in the presumptions of the Mahomedan law in regard to marriage, there could be no finding of legitimation, where the marriage of the mother was not presumed. Legitimation was effected by, and through, presumption of marriage.

Reference was made to Baillie's Digest of Mahomedan law, Haneefia, Book V, "Of Parentage"; chapters I and II of "Acknowledgment;" 2nd edition, 1875, pp. 406, 407 *et seq.*; the Hedaya, volume III, p. 549, citedin the above; Macnaghten's Principles of Mahomedan Law, chapter VII, paragraph 33; Macnaghten's Precedents, chapter VI, case XLVI; also to *Mirza Qaim Ali Beg* v. *Mussumat Hingun* (1); *Khajah Hidayut Oollah* v. *Roy Jan Khanum* (2); *Ashrufood Dowlah Ahmed Hossein* v. *Hyder Hossein Khan* (3); *Mahammed Azmat Ali Khan* v. *Lalli Begum* (4).

(1) 3 S. D. A., Sel. Rep., 152, 154. (2) 3 Moo. I. A., 295.
(3) 11 Moo. I. A., 94. (4) L. R. 9 I. A., 8; I. L. R., 8 Calc., 422.

The respondent did not appear.

Their Lordships' judgment was delivered by

LORD FITZGERALD.—In this case some questions of importance have been raised, and their Lordships regret that they have not had the assistance of counsel appearing for the respondent. Their Lordships are therefore impressed with the propriety of not going beyond questions which are absolutely necessary for the purpose of their decision.

The real issue in this case, and the only issue upon which their Lordships feel it necessary to decide, is whether Selim,—who was beyond question the actual son of Amir Hossein by a woman known as Domni,—had been so recognised by Amir Hossein as to give him the status of a son capable of inheriting. The suit relates to the property of Amir Hossein. He died in the year 1866 ; and if Selim is in the position of having the rights of a son in reference to heirship, the plaintiff in the case, who claims as the assignee of his interest, is entitled to succeed. A question of importance was raised by the counsel for the appellant. He contended that Selim could not be treated as having acquired the status of a son capable of inheriting, because he alleged that the intercourse between Amir Hossein and Domni was an adulterous intercourse, as she had been previously married to a person then and still living, and that consequently, whether her connection with Amir Hossein was preceded by a marriage ceremony with him or not, yet still the intercourse was adulterous, and that, according to Mahomedan law, the issue of that adulterous intercourse could not inherit as heir or acquire the status of a son by recognition. It, therefore, becomes necessary to consider in the first instance whether the alleged marriage of Domni to a man named Jummun has been established by satisfactory proof. Jummun appears to have been a person of somewhat the same degree in life as Domni, whose father's name was also Jummun. This marriage, if it took place at all, would have occurred shortly before or somewhat about the same period as the alleged marriage between Amir Hossein and Domni. The alleged marriage of Jummun with Domni is said to have been somewhere about 1852 or 1853, and the alleged marriage of Domni with

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Amir Hossein must have taken place about the same period. Amir Hossein died in 1866, leaving Selim his son then about eight or nine years of age, which would have made him born in 1857 or 1858. Another child had been born of the intercourse between Amir Hossein and Domni about four years before; so that the marriage between Amir Hossein and Domni, if it ever took place, is referred to about the same period as the alleged marriage between Jummun and Domni.

Now the account given by Jummun is certainly one of an incredible character. The statement is that he became acquainted with Domni when he went to live in this particular village. [His Lordship then examined the evidence as to the alleged marriage between Jummun and Domni and concluded as follows:—]

Their Lordships have then come to the conclusion that the parties fail to establish this marriage between Jummun and Domni. That relieves them from offering any opinion upon the very important question of law which was raised by the counsel for the appellant; namely, whether, if there had been this marriage, the offspring of an adulterous intercourse could be legitimated by any acknowledgment. The absence of reliable proof, such as their Lordships could act upon, of the marriage of Domni and Jummun, appears to their Lordships to relieve the case from further difficulty. They do not intend in the least to depart from the statement of the law upon an appeal to the Privy Council in the case of *Mahomed Azmat Ali Khan* v. *Mussumat Lalli Begum* (1) which is as follows:—'Their Lordships are relieved from a discussion of those authorities, inasmuch as the rule of Mahomedan law has not been disputed at the bar, *viz.*, that the acknowledgment and recognition of children by a Mahomedan as his sons gives them the status of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case.' Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it. The Judge of the primary Court who saw and who heard the witnesses, and the Judges of the Supreme Court who examined into the evidence afterwards, concur in opinion that there was sufficient evidence of the acknowledgment by Amir Hossein of Selim as his son, from

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which an inference is fairly to be deduced that the father intended to recognise him and give him the status of a son capable of inheriting. Upon that point both the Courts come to one conclusion; and that conclusion their Lordships adopt. They think that the status of Selim as son has been sufficiently established by recognition so as to enable him to claim as heir. Other questions have been raised in the case; but, in accordance with what has been stated as their Lordships' view, they think they ought not in a case of this kind to go beyond what is necessary for the decision.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal, and to affirm the decision of the Court below. There will, of course, be no costs in this case."

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins and Lattey.*

APPELLATE CIVIL.

1884
May 12.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

JUGGUT CHUNDER DUTT (PLAINTIFF) *v.* RADA NATH DHUR (DEFENDANT.)*

Partnership—Suit for an Account—Introduction of new member into firm—Contract Act IX of 1872, *s* 253, *cl.* 6 *and s.* 265—*Jurisdiction.*

The effect of cl. 6 of s. 253 of the Contract Act is not to render an assignment of a share in a partnership concern illegal or void as between the parties to the assignment, but only so far void as between those parties and the other partners as to cause an immediate dissolution of the partnership.

If no assent is given by the other partners to the assignment, the assignee is upon dissolution at liberty to sue for an account and for distribution, not as a partner, but as assignee of the right of his assignor in the partnership property.

Section 265 of the Contract Act commented on.

THE plaintiff in this case stated that, in the year 1284, Rada Nath Dhur, the defendant No. 1, and one Gopal Chunder Dhur opened a shop agreeing to share profit and loss equally between them, this business being managed by Mohesh Chunder

* Appeal from Appellate Decree No. 2334 of 1882, against the order of Colonel T. Lamb, Deputy Commissioner of Nowgong, dated the 28th of August 1882, reversing the decree of Gunabhi Ram Borua, Munsiff of that district, dated the 21st of September 1881.