APPELLATE CIVIL.

Before the Hon'ble Mr. A. H. L. Leach, Chief Justice, and Mr. Justice Varadachariar.

1937, September 1.

RAHIMAN BIBI SAHEBA BY AGENT SYED YUSUF SAHIB (PLAINTIFF), APPELLANT,

v.

MAHBOOB BIBI SAHEBA AND NINE OTHERS (DEFENDANTS), RESPONDENTS. *

Muhammadan law—Muhammadan marrying his wife's sister during his wife's lifetime—Child of such marriage—Legitimacy of.

The child of a marriage contracted by a Muhammadan with his wife's sister while his wife is alive is legitimate.

Tajbi v. *Mowla Khan*(1) followed. *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*(2) not followed.

The distinction between an invalid marriage and a void marriage in Muhammadan law pointed out.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 169 of 1933.

C. Sarangarajan for appellant.—The question in the appeal is whether a child of a marriage contracted by a Muhammadan with his wife's sister when his wife was alive is legitimate. In *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*(2) the Calcutta High Court held that such a marriage was void but the Bombay High Court in *Tajbi* v. *Mowla Khan*(1) held that such a marriage was only invalid.

[THE CHIEF JUSTICE.—The leading text-book writers who have dealt with the question within the last one hundred years have expressed themselves contrary to the view taken by the Calcutta High Court.]

The majority of them are against the Calcutta view. In the earlier editions of Wilson's Anglo-Muhammadan Law the Calcutta view was stated to be the correct one though in the fifth

* City Civil Court Appeal No. 52 of 1935.

(1) (1917) I.L.R. 41 Bom. 485. (2) (1895) I.L.R. 23 Cal. 130.

edition the Bombay view is accepted. Ameer Ali and Baillie are in favour of the Bombay view.

[VARADACHARIAR J.—Is there any Muhammadan law text which says that the children of such marriage are illegitimate ?]

There is no text. The texts deal only with such a marriage and not with the legitimacy or otherwise of the children born of such marriage. If the marriage is void, by necessary implication, the children must be declared to be illegitimate.

[THE CHIEF JUSTICE.—The prohibition against marriage of sisters is only a temporary prohibition as opposed to the prohibition against marriage with the mother-in-law which is a permanent prohibition.]

A. B. Nambiar and *Rafiuddin Ahmed* for respondents.

[THE CHIEF JUSTICE.—We do not want to hear you on the question of legitimacy.]

[*A. B. Nambiar* made his submissions on the question of mahar.]

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises the question whether a child of a marriage contracted by a Muhammadan with his wife's sister, the wife being alive, is legitimate. It also raises questions with regard to the right of certain parties to payments on account of mahar. LEACH C.J.

The suit was filed by the appellant for the administration of the estate of her deceased father, Syed Mahmood Sahib, a Sunni Muhammadan, who died in Madras on 17th July 1930. There were ten defendants, a widow and the sons and daughters of the deceased. The first respondent is the widow. The appellant and the third respondent are the children of the deceased's first wife, who predeceased him. Respondents 2, 5, 6, 8 and 10 are the sons and daughters of the first respondent by the deceased. Respondents 4 and 9 are the children of the third wife, who also

RAHIMAN BIBI v. MAHBOOB BIBI.

LEACH C.J.

predeceased her husband. The seventh respondent is the son of the fifth wife, who survived the husband but died before the suit was instituted. The first respondent was his fourth wife, and she and the fifth wife were sisters. It is contended by the appellant that the seventh respondent who is the son of the younger sister is illegitimate, his mother having married the deceased while her sister was alive. It is said that the Muhammadan law prohibits a Muhammadan marrying his wife's sister and if he does take her as a wife her children have no share in the inheritance. The seventh defendant denies that he is illegitimate, and, therefore, claims to be entitled to share in the estate of his deceased father. The learned trial Judge held that the marriage was irregular, but that this did not affect the legitimacy of the seventh defendant. With regard to the matter of mahar, the claimants are the first and seventh respondents, the first respondent claiming in her own right and the seventh respondent as his mother's heir. The learned Judge held that they were each entitled to a sum of Rs. 585 by way of mahar. The appellant says that they are entitled to nothing.

The question whether a Muhammadan may marry the wife's sister during the lifetime of his wife has been considered by the Calcutta High Court and by the Bombay High Court and they have arrived at different conclusions. The Calcutta case is that of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon*(1) and the Bombay case that of *Tajbi* v. *Mowla Khan*(2). The Calcutta decision stands alone, but the Bombay decision has

(1) (1895) I.L.R. 23 Cal. 130. (2) (1917) I.L.R. 41 Bom. 485.

the support of all the principal modern works on Muhammadan law. The Calcutta High Court holds that a Muhammadan cannot lawfully marry his wife's sister, and that if he has marital relation with his sister-in-law during his wife's lifetime the children born of the union are illegitimate. This decision is largely based on a passage from the Koran. The Koran does prohibit a man marrying his wife's sister, as it prohibits a man marrying his wife's daughter. The Bombay High Court considers that Muhammadan law recognises a difference between a marriage which is void from the beginning and can never become lawful and a marriage with a person who may later become a lawful wife. In the case of a marriage with a wife's sister the marriage would become lawful on the divorce or death of the wife. This view finds acceptance in the Fatwa-i-Alamgiri, which is of undoubted authority. It dates from about the middle of the seventeenth century. BEAMAN J. in *Tajbi* v. *Mowla Khan*(1) gives it the place in the Muhammadan law which the Institutes of Justinian occupy in Roman Law and points out that it was written when Muhammadanism was at the height of its power in this country.

Modern text books, as I have indicated, are unanimous on the question. In the second edition of Baillie's Digest, the following passage appears at page 157 of Part 1 :

"An invalid marriage has no legal effect before consummation, so that if a man should marry a woman by a contract which is invalid by reason of his having previously touched her mother with desire, and should then relinquish the wife he

(1) (1917) I.L.R. 41 Bom. 485.

RAHIMAN BIBI v. MAHBOOB BIBI. — LEACH C.J.

might lawfully marry the mother. But after consummation it is joined to valid marriages as to its effects, one of which is the establishment of *nusub*, or the child's paternity, as already mentioned."

The editor of the fifth edition of "Wilson's Anglo-Muhammadan Law" accepts the Bombay decision, although Sir Roland Wilson himself favoured the contrary opinion. Ameer Ali states the position as follows (fourth edition, Vol. II, page 326):

> "Thus a man may not marry two sisters or a woman and her niece by the same contract or one after another whilst the previous marriage is subsisting. But if such a marriage is contracted in fact, it is *invalid* (*fasid*) but not void (*batil*), for the prior marriage may become dissolved at any time by the death or divorce of one of them and thus validate the second union. Accordingly, although the Judge may separate the parties on the ground of the invalidity of the marriage, if it is consummated the issue would be affiliated to the father, in other words, they would be his legitimate children."

This opinion is emphasised at page 391. In the tenth edition of Mulla's Muhammadan Law (page 179) it is said that the bar of unlawful conjunction renders a marriage irregular, not void, and at page 180 there is express dissent from the Calcutta decision.

In view of this weight of authority we feel bound to accept the Bombay decision as being correct. While it is true that the Koran does prohibit a man marrying the sister of his wife during her lifetime, it is clear that this passage in the Koran has never been read as declaring the children of such a marriage to be illegitimate. In fact no writer on Muhammadan law has ever suggested that in the case of an invalid marriage, as opposed to a void marriage, the children are illegitimate. Of course, where a Muhammadan

marries a person contrary to law and it is not possible in any set of circumstances for that union to become regular, the issue would not be legitimate. The present case is one where the marriage was against the law when it was contracted but it was capable of becoming a valid marriage and therefore was valid so far as the seventh respondent is concerned. For these reasons we consider that the decision of the learned trial Judge on the question of the legitimacy of the seventh respondent was correct.

With regard to the question of mahar the position is very unsatisfactory. It is impossible on the evidence to say whether anything is due. The seventh respondent in fact made no claim in his written statement to his mother's mahar ; but he was allowed to raise the question in the course of argument. We consider that, as this question of mahar was not dealt with adequately by the learned Advocates in the Court below, it will be better to send the case back for further evidence on the question whether the first and seventh respondents are entitled to payments on account of mahar and on the question of the amounts. Accordingly the decree of the lower Court will, so far as it affects the matter of mahar, be set aside and the case remanded for retrial on this question. Leave will be granted to the seventh defendant to amend his written statement so as to make it quite clear that he is claiming to have paid out to him the money which he says was due to his mother on account of mahar. As the appeal has succeeded in part and has failed in part, we propose to make no order as to costs.

G.R.