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IN THE MATTER OF THE PETITION OF ASLU v. THE QUEEN-EMPRESS.

have been left out in s. 106 of the present Criminal Procedure Code; and it is further provided by the last-mentioned section that such Court may, at the time of passing the sentence, order the person convicted to execute a bond. Section 423 of the present Criminal Procedure Code expressly lays down what the powers of an Appellate Court are, and the power to take security for keeping the peace is not mentioned there: and there is no other provision of the law which enacts that the Appellate Court shall have the same powers as the Court of original jurisdiction has; and that being so, we do not think that, under the provisions of the Criminal Procedure Code (Act X of 1882), the Appellate Court has the power to order a security-bond to be taken; and we accordingly direct that the order of the District Magistrate, so far as it directs that each of the appellants, except Abdul, do give one surety of one hundred rupees to keep the peace for one year, be set aside.

H. T. H. *Rule made absolute.*

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

NUR MAHOMED (PETITIONER) *v.* BISMULLA JAN (OPPOSITE-PARTY).*

1889 *July* 9.

Criminal Procedure Code (Act X of 1882), s. 488—Evidence Act (Act I of 1872), s. 120—Bastardy proceedings—Order of affiliation—Evidence.

Bastardy proceedings under the provisions of s. 488 of the Criminal Procedure Code are in the nature of civil proceedings within the meaning of s. 120 of the Evidence Act, and the person sought to be charged is a competent witness on his own behalf.

Upon a summons, charging that the defendant, having sufficient means, had refused to maintain his child by his *nika* wife whom he had subsequently divorced, the Magistrate found that the marriage had not been proved, but that, upon the other evidence adduced, including the similarity of the features and the name of the child with those of the defendant, who did not appear before him during the proceedings, but with whom he stated that he was well acquainted, the child was the illegitimate child of the defendant. He accordingly made an order for maintenance under the section.

Held, that, under the circumstances, he was wrong in taking into account the similarity of the names and the features of the child and the defendant,

* Criminal Motion No. 270 of 1889, against the order passed by Syed Abdul Jubber, Presidency Magistrate of Calcutta, Northern Division, dated the 3rd of June 1889.

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but as there was ample evidence of the paternity, he was justified in making the order he did, as it was immaterial for the purpose of determining the liability of the defendant to maintain the child, whether the mother had been married to the defendant or not.

THIS rule was obtained for the purpose of getting an order set aside which had been passed under s. 488 of the Criminal Procedure Code, directing the petitioner to pay the sum of Rs. 15 a month for the maintenance of a child, named Nur Ahmed, aged about 3½ years.

The charge, as laid in the summons, was as follows: "That you, having sufficient means, refused to maintain your child Nur Ahmed, about 3½ years' old, the said child is by your *nika* wife, Bismulla Jan, whom you have subsequently divorced." The summons was issued at the instance of Bismulla Jan, the mother of the child, and both parties were represented by Counsel before the Magistrate, Nur Mahomed being exempted from appearing personally by an order made by the Magistrate, and not being present in Court on any of the various occasions on which the case was heard.

The judgment of the Magistrate was as follows:—

This is an application under s. 488 Criminal Procedure Code, for an order against the defendant Haji Nur Mahomed for the maintenance of a child aged about 3 years and 9 months, and named Nur Ahmed. The complainant's version of the case is that five years ago the defendant married her in the *nika* form; that the child was born in wedlock; and that seven or eight months after the birth of the child he discontinued his visits to her. The marriage is denied by the defendant, and the evidence adduced in support of it by the prosecution is wholly unworthy of credit. The only individuals who are said to have been present at the ceremony are the complainant's brother, her sister, and a man who gives lessons in the family. Although it is not necessary for the validity of a marriage under the Mahomedan law that there should be a good number of persons present, yet, according to custom, not only a man is nominated to perform the functions of a Kazi but friends on both sides are invited to witness a marriage. In this case not a single friend, not even Ahmed Sahib, who, according to complainant's own evidence, used to be with the defendant on other occasions, was present at his marriage with the complainant. There was none to act the part of a Kazi. The dower is said to have been Rs. 10 only. This sum is, no doubt, more than the minimum fixed by law, but it is not possible that the complainant, who was a dancing-girl, should have surrendered her liberty for a consideration which is less than what she expected as her wages for a night's performance. When a left-handed marriage takes place between a dancing-girl

and a respectable man of position, the proposal for an alliance generally emanates from the latter, and the former is not, therefore, satisfied with a moderate dower. The witness Haji Abdullah Dugmar has married a dancing-girl on payment of a dower of Rs. 2,500, and the complainant has herself got a dower of Rs. 1,000 at her subsequent marriage with a Hindu. It is not easy, therefore, to believe that, if the defendant had married her, she would have been satisfied with a trifling sum of Rs. 10, or would not have made him execute a deed of dower. It is also incredible that a man of the defendant's position in society would have allowed his wife to stay at the house of a professional songstress, such as her mother is, if he had led her to the altar; he would have naturally taken her to his own house, or, if that was not possible, would have removed her to some place where she would not be subject to the gaze of her mother's visitors. Under the above circumstances, I consider the story of her marriage with the defendant as a fiction. The story, I think, has been invented to create a right of inheritance for the boy.

The next question for determination is, whether the child is an illegitimate issue of the defendant? The mother of the child asserts that the defendant is its father, and there is sufficient proof that he was in the habit of visiting her about the time she became pregnant. No evidence is adduced by the defence to rebut her statement that she was in his keeping. It is contended that she had tried to father the child on one Jogendro Mullick, who was also, at one time, the complainant's paramour. I do not think the evidence which has been given on this point is deserving of any weight. There is no doubt that Jogendro kept the complainant for a certain period, but I am not satisfied that he kept her at the time of her conception. The evidence of Jogendro Nath's *mushahib* or companion, Aga Mahomed Ali, is anything but trustworthy. If Jogen was threatened with exposure and he had to pay a large sum of money to prevent her from carrying out her threat, there would certainly be taken some precautionary measure by Jogen or his friend, Aga Mahomed Ali, against the repetition of the threat. The death of Jogen, as Mr. Henderson argued, has led the defence to hint that he was the father of the child. There is no evidence that Jogen was the child's natural father. While, on the other hand, the evidence of the mother that the defendant is the father of the child, is corroborated by the ocular proof which the child itself furnishes. Although the witness for the defence, Aga Mahomed Ali, says that the child resembles the defendant in thinness only, no one who has seen Haji Nur Mahomed and sees the child can fail to observe a strong resemblance between the two. The child is, in fact, a miniature representation of the defendant. There is another matter which, in my opinion, confirms the statement of the complainant that the defendant is the father of the child. It is not disputed that the child was christened Nur Ahmed, and the name shows that within six days of its birth, when the ceremony of

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giving a name generally takes place, it was believed and known who the child's progenitor was. Not only the word "Nur" exists in both the names, but there is a correspondence of sounds in the terminal words Mahomed and Ahmed. Taking, therefore, all the circumstances of the case into a careful consideration, I am of opinion that the child is an illegitimate offspring of the defendant Haji Nur Mahomed. Mr. Garth contended that, as the complainant based the claim of the child to maintenance on the legitimacy of its birth, the Court can grant no allowance to it when its legitimacy was not established, I do not think this contention is right. Under the Statute quoted above, both legitimate and illegitimate children are entitled to maintenance, and although in this case the child is not proved to be legitimate, but is proved to be an illegitimate issue of the defendant, the law makes it obligatory upon the father to maintain it.

Suppose a child *X* sues its father *Z* for maintenance. Is it to have no maintenance because the Court, which tried the suit, declared that the marriage of *X*'s mother with *Z* was void, owing to a certain legal defect in the marriage contract? The section quoted imposes on a husband or a father the duty of maintaining his wife or helpless children, both legitimate or illegitimate, and he cannot claim exemption from it except on the ground of proverty.

I direct that Haji Nur Mahomed pay Rs. 15 per month for the maintenance of his illegitimate child Nur Ahmed.

Against that order, the petitioner moved the High Court, and a rule was issued which now came on to be heard.

Mr. *Phillips* and Mr. *Roberts* for the petitioner.

Mr. *M. P. Gasper* and Mr. *Henderson* for the opposite party

Mr. *Gasper* (showing cause).—The fact that Nur Mahomed was not called as a witness to deny the paternity of the child raises an almost irresistible presumption against him, and there can be no doubt that in such proceedings the person sought to be charged is a competent witness. Although there is no express decision to that effect in this country, the case of *In the matter of Tokee Bibee* v. *Abdool Khan* (1), decided by Wilson, J., shows that such proceedings are in their nature civil proceedings, and not criminal.

[TREVELYAN, J.—There can be no doubt that in England the defendant is a competent witness.—See Paley, 5th Edition p. 113.]

(1) I. L. R., 5 Calc., 536.

Mr. *Gasper*.—I submit that here also he is a competent witness, and that Nur Mahomed might have given evidence himself to deny the paternity, and not having done so, the Court is entitled to presume that he could not do so. In England, the Act requires corroboration of the evidence of the mother, but the amount of corroboration required by the Courts is very slight—see *Cole* v. *Manning* (1) and *Lawrence* v. *Ingmire* (2); and the Courts will not interfere if there be any corroboration whatever of the mother's testimony. Here then is ample evidence against the defendant, and the Court ought not to interfere. The Magistrate would have been perfectly justified, had the defendant been present before him at the hearing, in comparing the similarity of his features with those of the child, and taking such similarity into account, and the mere fact that the defendant was exempted from personal attendance does not, I submit, preclude such comparison, when, as stated by the Magistrate, Nur Mahomed's features were well known to him.—See *Bamundoss Mookerjea* v. *Mussamut Tarinee* (3)

Mr. *Phillips* (in support of the rule) did not contend that the defendant was not a competent witness, and might have been called, but argued that the evidence did not justify the order, and that the Magistrate should not have acted on the similarity of the features and the name of the child with those of the defendant, and referred to *Bamundoss Mookerjea* v. *Mussamut Tarinee* (3) as not supporting the proposition contended for by the other side. He further contended that the case the defendant was called to meet, being the charge that the child was his child by a *nika* wife, the whole case stood or fell on the question as to whether or not the marriage was proved, and it was not open to the Magistrate to pass an order on the assumption that the child was the illegitmate offspring of the defendant.

Mr. *Roberts* followed on the same side.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

In this case the Officiating Magistrate of the Northern Division made an order against Nur Mahomed, the applicant before

(1) L. R., 2 Q. B Div., 611. (2) 20 Law Times Rep., N. S., 391.
(3) 7 Moore's I. A., 169, see page 203.

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us, directing payment of Rs. 15 a month for the maintenance of a child, which the Magistrate found to be his child by one Bismulla Jan. We were asked, in the exercise of the revisional jurisdiction of this Court, to set aside that order. We gave a rule, and we were to a very great extent, if not entirely, induced to grant that rule by the circumstance that the Magistrate had compared the child, produced in Court, with what he recollected of the lineaments of Nur Mahomed, who had not appeared in Court, and thus acted upon the information, which he had obtained otherwise than in his Magisterial capacity, and also by the circumstance that he relied on the resemblance of name between the infant and the putative father. In granting the rule, we stated that the fact that Nur Mahomed had not been called as a witness was a circumstance weighing so strongly against the applicant that, although we sent for the record, we could not hold out to the applicant much hopes of success. Now we have heard Counsel on both sides; and the main contention placed before us by Mr. Phillips is that the suggestion of marriage having failed, the whole case failed. We however think that the basis of an application for the maintenance of a child under the provisions of s. 488 of the Code of Criminal Procedure is the paternity of the child, irrespective of its legitimacy or illegitimacy. The fact of the marriage of the parents may be not only strong evidence to show paternity, but also raises a presumption which has a very strong bearing upon the question of paternity. The summons, which is in the record called a charge, runs thus: "That you, having sufficient means, refused to maintain your child Nur Ahmed, about 3½ years' old." This would have been quite sufficient for the present purposes, but the summons then states further "the said child is by your *nika* wife Bismulla Jan whom you have subsequently divorced." The statement, as to the child being by his *nika* wife, is not at all a necessary statement, and the failure to prove marriage, does not, in our opinion, destroy the case altogether. The case for the plaintiff was that originally, when a child, she was in the keeping of Nur Mahomed; this relationship between them ceased to exist a short time after, when she went to a man called Ashgar; and after that, to Jogendro Chunn Mullick. Subsequently she left Jogendro Mullick and married

Nur Mahomed; and this child was the fruit of that marriage. The Magistrate, after hearing the evidence, came to the conclusion that the marriage was not proved; and we think that the Magistrate was right in coming to that conclusion. It appears however from the evidence that since the day on which the marriage is said to have taken place, this woman lived with Nur Mahomed and Nur Mahomed alone, until the child was born. She speaks to it, and there are witnesses who corroborate her statement. That would show, if uncontradicted, that this man was the father of the child. In fact they both lived together, and during this period the child was conceived. Evidence was given suggesting that Jogendro Mullick was the father of the child; but the evidence on this point has been disbelieved by the Magistrate, and we cannot say that the Magistrate was wrong. The evidence on the record shows, in the opinion of the Magistrate, that Nur Mahomed only could have been the father of the child, and there is evidence from which the Magistrate could arrive at such finding. Nur Mahomed was not called in the Police Court to contradict the case for the prosecution; and, except his Counsel in Court, no one on his behalf seems to have denied the paternity, and he never denied it. In England, it has been held more than once that, under the provisions of 14 and 15 Vic., c. 99, s. 2, bastardy proceedings are regarded as civil proceedings and the parties to them are capable of giving evidence; and, according to the case cited to us of Mr. Justice Wilson's, taken together with the English cases, there can be no question that bastardy proceedings are civil proceedings within the meaning of s. 120 of the Indian Evidence Act, and that the defendant thereto may give evidence on his own behalf. Mr. Phillips did not deny that this was the law; we are told that, after the witnesses for the defence had been examined, and Mr. Henderson had been heard in reply, Mr. Garth invited the attention of the Magistrate to the point whether Nur Mahomed was a competent witness or not. According to law, he was unquestionably a competent witness, and as he has not been called, we must make the usual presumption arising from the fact of such omission. The fact that Counsel by an error of judgment, or for some other reason, omitted to call him, does not, in the smallest degree, interfere with this presumption.

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We think, however, that the Magistrate was wrong in making use of his information, which he seems to have obtained otherwise than as a Magistrate. He was also wrong in using the circumstance of the similarity of names. That was not a circumstance which in the least could assist the Magistrate in coming to the conclusion of this kind. If it were so, any woman, by naming her child after a particular individual, might be able to make evidence in favour of herself, and thus give rise to a failure of justice. The Magistrate was therefore wrong in mixing up all these matters. But apart from these circumstances, there is ample evidence upon which the Magistrate could have made the order, and we have no reason to doubt the correctness of such order. The rule is discharged.

H. T. H. *Rule discharged.*

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

1889 *June* 26.

AUBHOY CHURN MOHUNT (PLAINTIFF, OPPOSITE-PARTY IN THE RULE) *v.* SHAMONT LOCHUN MOHUNT (DEFENDANT, PETITIONER IN THE RULE).*

Review of judgment—Code of Civil Procedure (Act XIV of 1882), ss. 623, 627, 629—Letters Patent, s. 15—Practice.

A second appeal was decided on the 1st June 1888 in favour of the respondent by Mr. Justice Wilson and Mr. Justice Beverley. On the 24th July 1888 an application for review was filed with the Registrar. Various reasons prevented the learned Judges above-named from sitting together until the month of March 1889. On the 6th March, the matter came up before their Lordships, when a rule was issued, calling upon the other side to show cause why a review of judgment should not be granted, being made returnable on the 28th March 1889.

On the 28th March, Mr. Justice Wilson had left India on furlough, and the rule was taken up, heard, and made absolute, by Mr. Justice Beverley, sitting alone: *Held*, that Mr. Justice Beverley had jurisdiction to hear the rule, and further that the order of that learned Judge was not a judgment within the meaning of s. 15 of the Letters Patent; and that no appeal

* Appeal under s. 15 of the Letters Patent against the order of Mr. Justice Beverley, one of the Judges of this Court, dated the 22nd of May 1889, in Rule No. 312 of 1889, in appeal from Appellate Decree No. 233 of 1888.