

PRIVY COUNCIL.

P. C.
1910.
March 9, 10,
April 29.

GHAZANFAR ALI KHAN (PLAINTIFF) v. KANIZ FATIMA AND ANOTHER
(DEFENDANTS).

[On appeal from the court of the Judicial Commissioner of Oudh at Lucknow.]
Muhammadan law—Marriage—Absence of direct evidence of marriage—Presumption of marriage—Long cohabitation—Effect on such presumption of alleged wife having been a prostitute when brought to alleged husband's house—Acknowledgement of woman as wife—Marriages of daughters to respectable men.

In this case the appellant's success depended on his proving his status as the legitimate son of his parents.

Held by the Judicial Committee (upholding the decision of the Judicial Commissioner's Court) that there was no evidence of marriage between them, and the presumption of marriage which might have arisen from their prolonged cohabitation did not apply because the mother before she was brought to the father's house was admittedly a prostitute.

Instances of alleged acknowledgement by the father of the mother as his wife, and the fact that two of the appellant's sisters, who were in the same case as to their legitimacy as he was, were married to respectable men with due formalities, were held, under the circumstances, insufficient to affect the question favourably for the appellant.

APPEAL from a judgement and decree (23rd July, 1906) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (3rd August, 1905) of the Subordinate Judge of Sitapur, and dismissed the appellant's suit.

The suit was brought against the respondents for the possession of an 8-anna share of a village named Bambhauri, which, with other immovable property, had belonged to his father Muzaffar Ali Khan, who died on 8th April, 1890, leaving him surviving a brother Nasir Ali Khan, Zohra Bibi his widow, who was childless, Phundan who claimed to be his second wife, and the plaintiff (appellant) a son and five daughters born to him of Phundan. On his father's death the plaintiff eventually obtained possession of the rest of the property, but his uncle Nasir Ali Khan took possession of the 8-anna share of Bambhauri, and in June, 1890, mutation of names was made in his favour by the revenue court in respect of that share. Nasir Ali Khan died in September, 1900, leaving a daughter named Kubra Bibi, to whom, as alleged by the defendant, he had made a gift of all his

Present :—Lord MACNAGHTEN, Lord COLLINS, Sir ARTHUR WILSON, and
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property including the 8-anna share of the village in suit, Kubra Bibi died in February, 1901, leaving a daughter named Kaniz Fatima, who married one Raza Husain, and they were the defendants in the suit, which was brought on 12th March, 1902.

The main defence was that the plaintiff was not legitimate, and that raised the only issue for decision in this appeal.

The Subordinate Judge on that issue said—

“I am clear that Musammat Phundan was a public prostitute. I cannot believe for a moment that a man of the position and means of Muzaffar Ali Khan finding himself childless from his *viradari* wedded wife Zohra, took it into his head to propose to a prostitute or the daughter of a prostitute or a pimp hoping by the alliance to beget children. It is in this country proverbial that prostitutes are averse to beget children as it hinders their nasty avocation. There is nothing on record to show that Chaudhri Muzaffar Ali, Khanzada, was reduced to such a state as far as his personality, age, health and means were concerned, that no Khanzada or other gentleman in the country would have offered him his daughter or sister for a wife. The strongest presumption is that he saw her dancing somewhere, became enamoured of her and took her for his concubine or wife. Now the only thing to be seen is whether it was in the capacity of a concubine or that of a wife that he took her. I am inclined to believe that it was in the capacity of a wife that he took her.”

He therefore held that the plaintiff was the legitimate son of Muzaffar Ali Khan, and made a decree in his favour.

The case on appeal to the Court of the Judicial Commissioner came before MR. E. CHAMIER (Officiating Judicial Commissioner) and MR. L. G. EVANS (First Additional Judicial Commissioner) whose judgement as to the plaintiff's legitimacy, after citing the passage from the Subordinate Judge's judgement given above, continued :—

“The learned Subordinate Judge then goes on to say that Muzaffar Ali Khan took her as his wife because it is found that she consented to the seclusion of the *parda* and that there is evidence of certain witnesses that Muzaffar Ali Khan admitted that Phundan was his wife and on one occasion on the 26th April, 1883, Muzaffar Ali Khan deposed in a court that he had a second wife who came from a family of prostitutes and he could have alluded to no one else except Musammat Phundan. He has also found that two of the daughters were married into respectable families, and it must, therefore, be presumed that Muzaffar Ali Khan considered them to be his legitimate daughters.

“The learned pleader for the defendants has contended that although there is a general presumption in favour of legitimacy amongst respectable people, yet as it is admitted that Musammat Phundan was in the first instance a prostitute, there is no presumption that the cohabitation between Muzaffar Ali Khan and

Musammat Phundan was preceded by any legal union, and in support of this contention he has cited the case of *Jarintool Butool v. Hoseinee Begam* (1). He has also contended that when Muzaffar Ali Khan gave evidence in 1883 he was obliged, when questioned about this second woman, to say that she was his wife because he would be ashamed to say in open court that he was keeping a prostitute together with his wife, and, secondly, because his evidence would have been useless for the object with which he was called unless he had declared that Musammat Phundan was his wife. It is also contended that there is ample evidence to show that Musammat Phundan continued to carry on her profession as a dancing girl long after 1870, the year during which it is alleged that the marriage took place. The evidence of the witnesses called to prove that Musammat Phundan continued to dance at marriages and other ceremonies after 1870 does not impress me in the least, but there is one important fact which throws great doubt on the alleged marriage in 1870. When the case was instituted early in 1902 the pleader for the plaintiff alleged that the marriage had taken place about 20 years before, that is, about 1882. This date was put back to 1870 by a statement subsequently made in December 1902. If any marriage had really been celebrated in 1870, is it possible that Musammat Phundan or any of her friends had no knowledge of the exact date and could not fix it accurately at once when the cases were called on for hearing? I refer also to the evidence of Daryao Lal, witness No. 16, for the defendants, who was in the employ of Muzaffar Ali Khan for 38 years. He says the eldest daughter was born in 1876, the second in 1877, the third in 1879, the fourth, fifth and sixth in rapid succession annually probably up to 1882. The plaintiff Ghazanfar Ali appears to have been born some years later probably 1888 or 1893. Now to my mind it is extremely improbable that, if regular cohabitation had commenced between Musammat Phundan and Muzaffar Ali Khan in 1870 after the alleged marriage, there would have been no issue of this marriage until 1876. Evidently Musammat Phundan was a young woman then who would, in the ordinary course of nature, be likely to give birth to a child within a year or 15 months after cohabitation commenced, and my opinion therefore is that no cohabitation took place between Musammat Phundan and Muzaffar Ali Khan until 1876. Then Musammat Phundan being a prostitute, Muzaffar Ali Khan found it an easy task to induce her to consent to live with him and afterwards when her children appeared in rapid succession and no children were born to his legal wife Musammat Zohra, Muzaffar Ali Khan considered it advisable to make the best of the existing state of affairs, and therefore gave out that he was married to Musammat Phundan and recognized her as his wife whenever he spoke about her. In order to provide maintenance for her after his death he had an 8-anna share in Sadrawan recorded in her name in 1897 at a time when she had given him six daughters. This was evidently done as a provision for this family. It is true that in his petition in this matter he describes Musammat Phundan as 'zouja apni' but he does not describe her as 'zouja mankuha apni.' If Muzaffar Ali Khan had then regarded her as his legal wife why was it necessary to make this special arrangement? Under Muhammadan Law, on his death, she would have succeeded to a share of

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one-eighth in the whole estate, a share which has never been demanded by her up to date. It is true that her son Ghazanfar Ali has been in possession of the bulk of the property since 1890 and this may account for the fact that Musammat Phundan has never claimed her share as the legal widow of the deceased, but it is a significant fact that she has never attempted since her alleged husband's death to be placed in such a position that her status as his legal widow would be no longer a subject of controversy.

"The above considerations lead to the conclusion that in spite of the fact that there may be a presumption of legitimacy owing to the admitted fact that Muzaffar Ali Khan and Musammat Phundan cohabited together as man and wife from about 1875 to 1890 and that Muzaffar Ali Khan had on several occasions acknowledged Musammat Phundan as his wife, yet there is absolutely no reliable evidence of any kind of the celebration of any legal marriage in 1870, and for reasons given above there is every ground for believing that cohabitation between Muzaffar Ali Khan and Musammat Phundan did not, as a matter of fact, commence before 1875. I would, therefore, decide that Ghazanfar Ali Khan is not proved to be the legitimate son of the deceased and his suit to recover possession of the share in Bambhauri should have been dismissed."

The appeal was therefore allowed and the suit dismissed.

On this appeal—

Ross and B. Dube, for the appellant, contended that the appellate court in India had wrongly decided that the appellant was not proved to be the legitimate son of his father Muzaffar Ali Khan and Musammat Phundan; and that on the evidence and circumstances of the case a presumption could under the Muhammadan Law be drawn that he was a legitimate son without actual or direct proof of the marriage of his parents. Such circumstances were the prolonged cohabitation between them; instances of acknowledgement by Muzaffar Ali Khan of Musammat Phundan as his wife; and the fact that two of Muzaffar Ali Khan's daughters also born to him of Musammat Phundan had been married to respectable men with all due ceremonies and might therefore be presumed to be his legitimate offspring. Reference was made to *Khaja Hidayat Oollah v. Rai Jan Khanum* (1), *Mahomed Banker Hossain Khan v. Shurfoon Nissa Begum* (2), *Ashrufod Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan* (3), *Mussumat Jariut-ool-Butool v. Hoseinee Begum* (4), *Khajoor-oonissa v. Rowshan Jehan* (5), *Mahammud Azmat Ali*

(1) (1844) 8 Moo. I. A., 295.

(2) (1860) 8 Moo. I. A., 136 (159).

(5) (1876) I. L. R., 2 Calc., 184 (200); L. R., 3 I. A., 291 (311).

(3) (1866) 11 Moo I. A., 94.

(4) (1867) 11 Moo. I. A., 194.

Khan v. Lalli Begum (1) and *Wise v. Sunduloonissa Chowdhraanee* (2).

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De Gruyther, K. C., and *S. A. Kyffin*, for the respondents, contended that the appellant had entirely failed to prove that he was the legitimate son of his parents. There was no direct evidence of their marriage; and their long cohabitation which was relied upon to give rise to a presumption of their marriage did not under the circumstances allow such a presumption to be raised, as *Musammat Phundan* had been admittedly a prostitute. The appellant therefore having been born out of wedlock was illegitimate. Reference was made to *Mahomed Barker Hossein Khan v. Shurfoon Nissa Begum* (3); Sir Roland Wilson's *Mahomedan Law*, 3rd Ed., page 162, paragraph 84, and *Ashruf-ood Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan* (4).

There was no evidence of repute in this case except the marriages of *Muzaffar Ali Khan's* daughters, and that was insufficient to prove the appellant's legitimacy. The decision of the Judicial Commissioners should be upheld for the reasons given in their judgement.

Ross replied, citing *Mr. Ameer Ali's Mahomedan Law*, Volume II, page 332, and Sir Roland Wilson's *Mahomedan Law*, 3rd Ed., page 98, paragraph 17, as to the meaning of the word "*nikah*".

1910, *April 29th*. The judgement of Their Lordships was delivered by SIR ARTHUR WILSON:—

This is an appeal from a judgement and decree of the Court of the Judicial Commissioner of Oudh, which overruled the decision of the Subordinate Judge of Sitapur.

The suit out of which the appeal arises was brought by the present appellant in the last mentioned court to establish title to and recover possession of an eight-anna share in the village of Bambhauri, the plaintiff's claim being based upon his alleged right to recover the property in question as heir to his father, Chaudhri Muzaffar Ali Khan. About the parentage of the

(1) (1881) I. L. R., 8 Cal., 422; (3) (1860) 6 Moo. I. A., 136 (159).

L. R., 9 I. A., 8.

(2) (1867) 11 Moo. I. A., 177.

(4) (1866) 11 Moo. I. A., 94 (113, 114).

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appellant there is no dispute, and of all the questions raised in the case, one only remains for consideration on the present appeal, and that is whether the appellant is to be regarded as the legitimate son of his father. On this question the Subordinate Judge decided in the appellant's favour, but he was overruled by the Court of the Judicial Commissioner.

Their Lordships are of opinion that the learned Judges of that Court were right.

It may be stated at once that the sole question is, whether on the evidence in the case, coupled with all legitimate presumptions, it is shown that the appellant was born in wedlock. No question has been raised either in India or before Their Lordships—such has been raised in many cases—as to any possible legitimation by subsequent acknowledgement or treatment.

There was no evidence of marriage between the parents of the appellant.

The learned Judges fully recognised that prolonged cohabitation might give rise to a presumption of marriage, but that presumption is not necessarily a strong one, and Their Lordships agree that it does not apply in the present case, for the mother before she was brought to the father's house was, according to the case on both sides, a prostitute.

The learned Judges next notice certain instances in which the deceased father is said to have acknowledged the mother as his wife, but the effect of such acknowledgement has been rightly estimated by the learned Judges.

The next point relied upon by the appellant was that two of his sisters, whose legitimacy was as much open to question as his own, were married to respectable men, and the marriages conducted with due formalities. This is a point worthy of consideration, but it would be easy to attribute too much weight to it.

Their Lordships are of opinion that the decision of the Judicial Commissioner's Court was right. They will humbly advise His Majesty that this appeal should be dismissed.

The appellant will bear the costs.

Appeal dismissed.

Solicitors for the appellant:—*Barrow, Rogers and Nevill.*

Solicitors for the respondents:—*T. L. Wilson & Co.*

J. V. W.