

1925.

BBLI RAJ
v.
RAM
SARUP.

(2) If so, has that negligence resulted in pre-judice to the rights of the minors?

Both sides will be allowed to produce evidence on these issues and the findings will be returned to this Court within three months from this date. On receipt of the findings the usual period of ten days will be allowed for objections.

Issues remitted.

1925.
June, 8.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Mukerji.*

MUHAMMAD SHAFIQ-ULLAH KHAN (PLAINTIFF) v.
NUH-ULLAH KHAN AND OTHERS (DEFENDANTS).*

*Muhammadan law—Marriage—Legitimacy—Presumption—
Acknowledgment—Evidence of the impossibility of a valid
marriage between the alleged parents.*

According to Muhammadan law, it is only where direct proof of marriage is not available that indirect proof of marriage by way of acknowledgment of legitimacy in favour of a son is allowed to take the place of direct proof of marriage. Where direct proof is available to establish that marriage was impossible or a marriage would be invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise. *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* (1), *Muhammad Allahadad Khan v. Muhammad Ismail Khan* (2), referred to.

THIS was an appeal under section 10 of the Letters Patent from the judgement of one Judge of a division bench.

Babu *Piari Lal Banerji* (with him Mr. *M. U. S. Jang*), for the appellants.

Maulvi *Iqbal Ahmad*, for the respondents.

MEARS, C. J., and MUKERJI, J.—This appeal comes before this Bench on account of a difference of opinion between two learned Judges of this Court who heard the appeal in the first instance from the

* Appeal No. 97 of 1924, under section 10 of the Letters Patent.

(1) (1921) I.L.R., 48 Calc., 856.

(2) (1888) I.L.R., 10 All., 259.

court of a Subordinate Judge. The two learned Judges having differed, this appeal was filed under section 10 of the Letters Patent.

The only point for determination in this appeal is whether the defendants respondents are the legitimate sons of one Inayat-ullah Khan.

[The Court then discussed the evidence and continued :—]

Taking the whole evidence on the record, therefore, we are more than satisfied that the plaintiff's case is a true one, namely, Inayat-ullah kept a Hindu married woman as his mistress, and the defendants are the children of Inayat-ullah by that woman.

In the teeth of the above finding no rule of presumption of legitimacy or marriage can avail the defendants. The state of the law has been very clearly set forth in the judgment of this Court delivered by the learned Judge who was for decreeing the appeal, and we do not propose to go over the same ground again. It would be sufficient to mention that it is only where direct proof of marriage is not available that indirect proof of marriage by way of acknowledgment of legitimacy in favour of a son is allowed to take the place of direct proof of marriage. Where direct proof is available to establish that marriage was impossible or a marriage would be invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise. See the Privy Council case of *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* (1), also *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (2).

The result is that this appeal succeeds, and we set aside the decrees of this Court and that of the court of first instance and decree the plaintiff's claim for possession with costs throughout.

Appeal allowed.

(1) (1921) I.L.R., 48 Ca'c., 856.

(2) (1888) I.L.R., 10 All., 289.

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