APPELLATE CIVIL.

1881
April 2.

Before Mr. Justice Spankie and Mr. Justice Straight.

MUHAMMAD ISMAIL KHAN (DEFENDANT) *v.* FIDAYAT-UN-NISSA AND OTHERS (PLAINTIFFS).*

Muhammadan Law—Presumption as to legitimacy of son—Custom of primogeniture.

Observations on the law laid down by the Privy Council regarding the presumption of legitimacy which arises, under the Muhammadan law, in the absence of proof of marriage, when a son has been uniformly treated by his father and all the members of the family as legitimate.

Also on the law laid down by the Privy Council regarding the custom of primogeniture and the exclusion of females and other heirs from inheritance.

THE facts of this case, so far they are material for the purposes of this report, were as follows:—One Ghulam Ghaus Khan, a Biluch, and a Muhammadan (Sunni), whose ancestors had for many years been settled at Jhajhar in the Meerut district, died on the 6th November, 1879, possessed of considerable moveable and immoveable property situate in that district. He left a will, bearing date the 5th November, 1879, the material clauses of which were as follows:—"(iii.) All the servants who are at present in service shall be retained in service as heretofore, provided they continue to maintain their good character. (iv.) Certain female slaves who were bought by me are in my keeping; one of them, Nanhi Begam, has also got children; if she continue to be of good character, she and her children shall continue to receive allowances as heretofore; the other female slaves shall also continue to receive similar allowances. (v.) I appoint Muhammad Ismail Khan, my son, whom I have already intrusted with the management of the estate for a period of five years, as executor of this will; he should take absolute possession of the entire estate, and manage all the villages according to his discretion as he has hitherto done. (vii.) If the sisters of Muhammad Ismail Khan at any time come to or settle in Jhajhar, he shall not overlook to provide for them for their necessary expenses according to his means, as is the usage of our family. (viii.) Muhammad Ismail Khan is the absolute proprietor of my entire estate, and no person is authorised to interfere

*First Appeal, No. 100 of 1880, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 14th July, 1880.

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with his possession and powers; if by any reason Muhammad Ismail Khan, executor, shall be obliged to leave Jhajhar, he shall have power to appoint any of his relations or issue, whom he may think fit, as manager of the estate like himself." In May, 1880, the three daughters of Ghulam Ghaus Khan *viz.*, Fidayat-un-nissa, Karamat-un-nissa, and Barkat-un-nissa, and Nanhi Begam, calling herself the lawful wife of Ghulam Ghaus Khan, and the issue of Nanhi Begam by Ghulam Ghaus Khan, *viz.*, Mustahkam Khan, Naim Khan, Mukim Khan, and Himayat-un-nissa calling themselves the lawful issue of Ghulam Ghaus Khan, brought the present suit against Muhammad Ismail Khan, the son of Ghulam Ghaus Khan, for possession of their shares of his father's estate. The defendant set up as a defence to this suit that Nanhi Begam was not the lawful wife of Ghulam Ghaus Khan, and her children by him were illegitimate, and therefore her claim and that of such children to inherit Ghulam Ghaus Khan's estate was not maintainable; and that by the custom of the family, which the will of Ghulam Ghaus Khan recognised and affirmed, the eldest son succeeded, and females were excluded from succession; and therefore the claim of the other plaintiffs, the daughters of Ghulam Ghaus Khan, was not maintainable. The Court of first instance fixed the following issues, amongst others, for trial:—"Is Nanhi Begam the married wife of Ghulam Ghaus Khan, or his mistress; is she, and are her children, entitled to inherit? Are the daughters of Ghulam Ghaus Khan entitled to inherit, or are females in the family of Ghulam Ghaus Khan not entitled to inherit, and the eldest son alone succeeds and other members of the family are excluded from inheritance? How far can the will be acted on?" The Court found on the evidence in the case that the children of Nanhi Begam by Ghulam Ghaus Khan had been uniformly treated by their father and his lawful daughters and son as legitimate; and held, relying on *Khajooroonissa* v. *Rowshan Jehan* (1) and the Privy Council decision therein cited (2), that it must be presumed that Nanhi Begam was the lawful wife of Ghulam Ghaus Khan, and her children by him legitimate. It also found that there was no such custom of succession in the family of Ghulam Ghaus Khan as was set up

(1) I. L. R., 2 Calc. 184; S. C., 3 I. R. Ind. App. 291.

(2) *Khajah Hidayut Oollah* v. *Rai Jan Khanum*, 3 Moore's I. A., 295.

by the defendant, and it held, relying on *Khajooroonissa* v. *Rowshan Jehan* (1), that according to Muhammadan law a devise of property could not be made to one heir to the exclusion of the other heirs without their consent; and that therefore the plaintiffs could not be excluded from inheriting by the will of Ghulam Ghaus Khan in the defendant's favour. It accordingly gave the plaintiffs a decree for their legal shares of the estate of Ghulam Ghaus Khan.

The defendant appealed to the High Court. On his behalf it was contended, on the evidence, that Nanhi Begam had not been treated by Ghulam Ghaus Khan and the members of the family as his wife or her children by him as legitimate; and that the custom of succession in the family set up by him was proved.

Mr. *Conlan* and Pandits *Bishambhar Nath* and *Ajudhia Nath*, for the appellant.

Mr. *Ross*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Munshi *Hanuman Prasad*, for the respondents.

The material portion of the judgment of the Court (SPANKIE, J., and STRAIGHT, J.,) was as follows :—

SPANKIE, J.—With regard to the finding of the lower Court as to the status and treatment of Nanhi Begam and her children in the house of Ghulam Ghaus Khan, the decision of the Subordinate Judge is open to the exceptions taken in appeal. The Subordinate Judge indeed admits that there is no proof of the performance of an actual marriage between Ghulam Ghaus Khan and Nanhi Begam. Two witnesses say that they attended it. But the lower Court does not believe their evidence. One Taj Muhammad Khan certainly deposes that he was present, but he does not remember the date of the marriage. He knows that Budh Shah was "vakil." Budh Shah, however, deposed that he was not the "vakil," nor had he attended or been invited to the marriage. The witness, too, appeared hostile to Ghulam Ghaus Khan and Ismail Khan. He says that both sued him for arrears of rent and for loans. Murtiza Khan, the other witness, deposed that Budh Shah was the "vakil;" that he attended the marriage, being on leave from his regiment, the

(1) I. L. R., 2 Calc. 184; S. C. 3 L. R. Ind. App. 291.

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7th Cavalry. He says that the marriage was in April, but he does not remember the year. He is a relative of Taj Muhammad Khan. The lower Court remarks that this witness had no leave papers. These, to be sure, might have been lost in twenty years, but it does not appear that Murtiza Khan set up this excuse for not producing them. This evidence, we agree with the Subordinate Judge, is not sufficient to prove that any marriage was performed between Ghulam Ghaus Khan and Nanhi Bogam, and indeed it is not alleged to have occurred in any particular year or on any particular date, either in the plaint or elsewhere. The plaint assumes Nanhi Begam to have been the wife of Ghulam Ghaus Khan. She is so described in the heading, but there is no reference to any marriage in the body of the plaint. But the lower Court, having found that there was no actual marriage, goes on to presume from the evidence of the plaintiff's witnesses that Nanhi Begam was Ghulam Ghaus Khan's wife, and that her children by him were legitimate. He lays it down that, when a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises, under the Muhammadan law, that the son's mother was his father's wife, although conclusive proof of marriage be wanting. He also insists on the rule that the children born of a prostitute and an unmarried woman shall, if they have been admitted by the father to be legitimate, and treated by him as such, be held to be legitimate. He cites the judgments of the Privy Council in the cases of *Khajooroonnissa* v. *Rowshan Jehan* (1) and *Ashrufood Dowlah Ahmed Hossein* v. *Hyder Hossein* (2) in support of this rule. But the Subordinate Judge has not sufficiently considered the evidence and circumstances of the case and whether there are sufficient grounds for the presumption he has made. It is true that in the case of *Ashrufood Dowlah Ahmed Hossein* (2) their Lordships affirm the principles laid down in the case of *Mahomed Bauker Hoossain* v. *Shurfoon Nissa Begum* (3). They do not question the position that, according to the Muhammadan law, the legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances, without proof, either of a mar-

(1) I. L. R., 2 Calc. 184; S. C., 3 L. R. Ind. App. 291.
(2) 11 Moo. I. A. 94.
(3) 8 Moo. I. A. 136.

riage between the parents, or of any formal act of legitimation. But the presumption of legitimacy from marriage, according to the judgments of their Lordships, follows the bed, and whilst the marriage lasts the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation: an antenuptial child is illegitimate: a child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. But their Lordships add to these observations the following warning and caution, which the lower Court seems to have lost sight of. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. In the same case, referring to *Khajah Hidayut Ollah* v. *Rai Jan Khanum* (1), their Lordships observe that the cohabitation spoken of in that judgment was continual; it was proved to have preceded conception, and to have been between a man and woman cohabiting together as man and wife, and having that repute before the conception commenced; and the case decided that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment, sufficed to prove legitimacy. These remarks are most important in their bearing upon the case now before us, in which there is no actual proof of any marriage, and no marriage was ever acknowledged by Ghulam Ghaus Khan. On the contrary, if the will be admitted as genuine, marriage was repudiated by him, since he calls Nanhi Begam a slave-girl in his

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

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keeping, and refers to the children as his children by her as a mistress, if he refers at all to them as his own. In a later judgment to be found in *Jariut-oll-butool* v. *Hoseini Begum* (1) their Lordships say:—"If it were once conceded that a woman once a concubine could be converted by judicial presumptions into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption arise? The ordinary legal presumption is that things remain in their original state. In that case the man cohabited with the woman who had been a prostitute, or who lived in his house. At his death she claimed to be his wife, and called witnesses to prove an actual marriage, but which fact she failed to establish. In the case of *Khajooroonnissa* v. *Rowshan Jehan* (2) on which the Subordinate Judge relied, where their Lordships deal with the right of the plaintiff to succeed to Bebee Lodhun, they say that the answer depended upon whether Bebee Lodhun was merely a concubine or a wife. The presumptions in that case were inferences of fact. Their Lordships find that it was an undisputed fact that the son of Bebee Lodhun was treated by his father and by all the members of the family as a legitimate son, and as the other legitimate sons. Here some presumption is raised that his mother was his father's wife. But the presumption might be rebutted. Their Lordships found that it was not rebutted. On the contrary, there had been an undoubted acknowledgment by the father that Bebee Lodhun was his wife, inasmuch as when his principal wife sued him, he objected on the ground that Bebee Lodhun, one of the other wives, was not joined. We must apply the principles laid down in these decisions to the facts and circumstances of the particular case before us, and then determine whether any and what presumptions arise favourable to the plaintiffs, and if there are presumptions in their favour, whether they have or have not been rebutted.

Now, what does the evidence for the plaintiffs disclose and how far is the evidence reliable? (After an examination of such evidence the learned Judge continued:) Such is the evidence

(1) 11 Moo. I. A. 194.

(2) I. L. R., 2 Calc. 184; S. C., L. R., 3 Ind. App. 291.

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to prove marriage, and such treatment both of Nanhi and her children that a presumption arises that she lived with Ghulam Ghaus Khan as his wife and the children were regarded as legitimate by him. It may be admitted that, if the evidence of the two daughters could be accepted, the presumption might arise. But that evidence was not taken in Court and is not reliable for the reasons given. It is the evidence of persons determined to say the same thing by previous concert, and it is the evidence of persons hostile to the defendant.

It seems, however, upon such evidence that the presumption as to the treatment of Nanhi as a wife and of the children as legitimate by Ghulam Ghaus Khan does not fairly arise; but if it does, the evidence on the other side sufficiently rebuts the presumption. (After referring to and considering the evidence against such presumption the learned Judge continued:) On the whole, then, after full consideration of the case, looking at the evidence for the plaintiffs and that for the defendant, that for the latter appears more reliable, supported as it is by what documentary evidence there is of the mind and admission of Ghulam Ghaus Khan himself in regard to the position occupied by Nanhi and her children in his house. There is undoubtedly no marriage proved. There seems too to be no doubt that Nanhi was taken into Ghulam Ghaus Khan's house at an early age, and that when she was old enough for such purpose he cohabited with her, and continued to do so for years; but there is no sufficient evidence to show that he ever recognized her as his wife or in any other character than that of a concubine, or the children in any other character than that of his illegitimate issue. We therefore cannot but conclude that Nanhi was not the wife of Ghulam Ghaus Khan, and that the children were born illegitimate, and have never been legitimated by treatment in the house of their father as legitimate, and on this ground the suit of Nanhi and her children must fail.

There now remains the question as to the alleged custom of primogeniture, and the exclusion of the females and other heirs from inheritance. Such a custom must be established by those who allege its existence. What is set up is a family usage

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not connected with a raj or principality,—*Surendronath Roy* v. *Heeranmonee Burmoneah* (1), and it has been laid down that the prevalence in any part of India of a special course of descent in a family differing from the ordinary course of descent in that place of the property of people of that class or race stands on the footing of usage or custom of the family,—*Abraham* v. *Abraham* (2). It must have had a legal origin and have continuance, and whether property be ancestral or self-acquired, the custom is capable of attaching and being destroyed, equally as to both. Assuming, though it is not directly or indirectly so set out in the pleadings, and the evidence upon the point is of the vaguest kind, that the Emperor Humayun granted the village in 1550 A.D. to Syed Muhammad Mir Khan in reward for his services, and with the condition that the rule of primogeniture should attach to it, it is certain that there is no evidence of the grant itself, (even if it were a legal one, of which there might be some question), still less is there any evidence that from the date of the occupation of the district by the British Government there was any claim made on behalf of the representative of the original grantee that primogeniture was the rule of the family; nor has any such claim been recorded up to the date of the present suit, though there have been intermediately settlements and revision of settlements. The family is a Biluch family, and it is not denied, but proved, that they are Muhammadans of the Sunni sect. It is in evidence that there are Biluchis of the same common descent and of the neighbourhood among whom such a rule does not prevail. It is quite contrary to the Muhammadan law of inheritance, and of course contrary to the ordinary course of descent amongst families of Sunnis of the pargana and district. (The learned Judge, after considering and commenting upon the evidence on both sides regarding the alleged custom of primogeniture, continued as follows:) We have now reviewed the evidence on this part of the case, and our conclusion is that defendant has not established a special course of descent in Jhajhar and the district of Bulandshahr, in which so many Biluchis and foreigners are settled, who are all Muhammadans and Sunnis; that no legal origin of such custom is shown; and if it had been, that no continuance of it has

(1) 12 Moo. I. A. 81. (2) 9 Moo. I. A. 224.

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been proved: and therefore we must hold the point to be established against the defendant. It is admitted that, if the plea of family usage fails, the heirship of the three legitimate daughters of Ghulam Ghaus Khan cannot be disputed. The result of our judgment on the whole case is that the claim of Choti Begam otherwise Nanhi Begam as wife, and of Mustahkam Khan, Naim Khan, Mukim Khan, otherwise Raffi Khan, minor sons, and of Himayat-un-nissa, minor daughter of Ghulam Ghaus Khan, under the guardianship of Mustahkam Khan, is dismissed altogether, with costs: but that the claim of Fidayat-un-nissa, Karamat-un-nissa, and Barkat-un-nissa, daughters of Ghulam Ghaus Khan, in respect of their shares, must be decreed as against the defendant, and therefore the shares of these ladies under the Muhammadan law are hereby decreed against Muhammad Ismail Khan, with costs. We are not disposed to diminish their shares because they were associated with Nanhi and her children in the litigation, as the circumstances of the case may account for the fact of this association.

Decree modified.

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Before Mr. Justice Spankie and Mr. Justice Oldfield.

MUHAMMAD GULSHERE KHAN (PLAINTIFF) *v.* MARIAM BEGAM AND ANOTHER (DEFENDANTS).*

Muhammadan Law—Gift—"Marz-ul-maut."

According to Muhammadan law a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance, *i.e.*, has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death. *Labbi Bibi* v. *Bibbun Bibi* (1) followed.

Held therefore, where at the time of a gift the donor had suffered from a certain sickness for more than a year, and was in full possession of his senses, and there was no immediate apprehension of his death, and he died shortly after making the gift, but whether from such sickness or from some other cause it was not possible to say, that under these circumstances the gift was not invalid according to Muhammadan law.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the appellant.

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* First Appeal, No. 68 of 1880, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 11th February, 1880.

(1) N.-W. P. H. C. Rep., 1874, p. 159.