1934

SHEO SHANKAR v. MUSAMMAT RAM DEI

been proved and as it has been admitted before us that Musammat Ram Dei's title to the property left by Parbhoo rested solely on that will, it follows that the plaintiffs are entitled to the plots transferred by Musammat Ram Dei subject, of course, to the defence that the respondents can take up with respect to those plots.

Srivastava and Ziaul Hasan, JJ.

As the finding of the trial Court on the question of the will has been reversed, the case must go back to that Court for trial on the merits. We, therefore, remand the case under order XLI, rule 23 of the Code of Civil Procedure. The case will be tried in respect of the plots of land transferred by Musammat Ram Dei and full opportunity will be given to the respondents to put up all possible defences to the claim. Costs will abide the result.

Case remanded.

APPELLATE CIVIL.

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice E. M. Nanavutty

1934 *December* 14

MUSAMMAT SARWAR ARA BEGAM (PLAINTIFF-APPELLANT) *v.* NAWAB BAHADUR ALI KHAN AND OTHERS, DEFENDANTS AND OTHERS (PLAINTIFF-RESPONDENTS)*

Mohammadan Law—Marriage—Muta—*Co-habitation after expiry of* muta *period—No evidence of fresh agreement of* muta *—Presumption that* muta *continued.*

If it is once proved that co-habitation originated after a *muta* marriage, the proper inference, in default of evidence to the contrary, is that the *muta* continued during the whole period of co-habitation. Where, therefore, co-habitation is continued after the expiry of the term of a *muta* marriage, it must be presumed that the term of the *muta* has been extended, even if there is no evidence to that effect, and the children born of such co-habitation must be held to be legitimate.

Messrs. *Zahur Ahmad* and *Habib Ali Khan,* for the appellant.

*First Civil Appeal No. 26 of 1933, against the decree of Pandit Braj Kishen Topa, Subordinate Judge of Malihabad at Lucknow, dated the 23rd of December, 1932.

1934

MUSAMMAT SARWAR ARA BEGAM v. NAWAB BAHADUR ALI KHAN

Messrs. *Naziruddin* and *Abid Husain*, for the respondent No. 1.

Mr. *Mojiz Husain* as guardian of respondent No. 7.

Mr. *S. M. Rafi* as guardian of respondent No. 5.

KING, C.J., and NANAVUTTY, J.:—This is a plaintiff's appeal arising out of a suit for possession of a one-third share in the property left by Nawab Raza Ali Khan deceased. Nawab Raza Ali Khan had three wives. Bahadur Ali Khan, defendant No. 1, was his son by the first wife. Defendants Nos. 2 to 4 were his daughters by the second wife. Sarwar Ara Begam plaintiff No. 1 was the third wife and she had three children, namely, defendant No. 1 Wazir-un-nisa *alias* Shahr Banu and plaintiff No. 2 Shaukat Jahan and a son named Faiz Ali Khan.

The plaintiff's case was that she was married to Nawab Raza Ali Khan in the *muta* form on the 18th of August, 1922 for a period of five years. During this period her first daughter Wazir-un-nisa was born. Her second daughter Shaukat Jahan plaintiff No. 2 was also born shortly before the expiry of the period, namely, on the 7th of August, 1927. She alleges that three days before the period was about to expire, namely, on the 15th of August, 1927, Nawab Raza Ali Khan entered into a second *muta* marriage with her for a period of two years. During this second period her son Faiz Ali Khan was born on the 3rd of March, 1929.

Nawab Raza Ali Khan died on the 28th of April, 1929 and Faiz Ali Khan died shortly afterwards, namely, on the 12th of June, 1929. Plaintiff No. 1 being merely a *mutai* wife does not claim any share as a widow in the assets of her deceased husband, but she claims a two ninths share as being the sole heir of her son Faiz Ali Khan. Plaintiff No. 2 Shaukat Jahan claims a one-ninth share as daughter of Nawab Raza Ali Khan.

Defendant No. 1 denied the legitimacy of all the children of plaintiff No. 1. Although he admitted that

a *muta* marriage had been performed between his father and plaintiff No. 1, he alleged that plaintiff No. 1 proved to be unchaste and owing to her misconduct his father divorced or released her in the summer of 1926.

It is common ground between the parties that the plaintiff No. 1 was the *mutai* wife of the deceased Nawab and that the *muta* was performed on the 18th of August, 1922, for a period of five years. There is some question as to whether this period should be reckoned according to the English calendar or according to the Mohammadan calendar but this point is not of much importance. The Court below found that although defendant No. 5 and plaintiff No. 2 were the legitimate children of the Nawab, being born during the term of the first *muta*, there was no proof that the term had ever been extended by a second *muta* marriage and therefore the Court held that the legitimacy of Faiz Ali Khan, who was born on the 3rd of March, 1929, had not been proved. The learned Subordinate Judge decreed the suit of the plaintiff No. 2 in respect of a one-seventh share but dismissed the claim of plaintiff No. 1.

King, C. J. and Nanavutty, J.

The plaintiff No. 1 comes to this Court in appeal and challenges the finding of the trial Court on the question of legitimacy of Faiz Ali Khan.

There is little direct evidence on this point. We have the oral testimony of the plaintiff No. 1 who deposes that shortly after the plaintiff No. 2 was born the Nawab said that only three days were left in the *muta* period and a maulvi should be sent for. As the Maulvi Saheb could not be found the Nawab Saheb himself read the *muta*. The dower was fixed at Rs.20 and the period fixed was two years. There is no evidence to support this second *muta* ceremony directly. There were no witnesses to the ceremony, although the plaintiff No. 1 stated that her sister was present and her sister's husband was outside the room where the ceremony was performed. These persons have not been

1934

MUSAMMAT SARWAR ARA BEGAM v. NAWAB BAHADUR ALI KHAN

King, C. J. and Nanavutty, J.

summoned to give evidence. The Court below has remarked that plaintiff No. 1 is obviously a highly interested witness and has referred to some contradictions in her evidence and has come to the conclusion that she should not be believed on this point.

The most important evidence in support of the alleged second *muta* ceremony is exhibit 9. This document is alleged to be in the handwriting of Bahadur Ali Khan, defendant No. 1. It is not signed by him but certain witnesses have deposed that it is in his handwriting. This document states the date and details of the first *muta* ceremony on the 18th of August, 1922. On the margin there is a further note giving the dates on which the successive years of the term of the first *muta* expired and a sentence referring to the second *muta* in the following words: "The *muta* was performed on the 15th of August, 1927, corresponding to Safar 1346, on Monday." The plaintiff's case is that the Nawab Saheb got his son Bahadur Ali Khan to write down this note in his own hand in order that he might not subsequently dispute the fact of the second *muta*. Bahadur Ali Khan has entirely denied the writing of any part of exhibit 9. We have been taken through the evidence on this point and we may say at once that in our opinion the document cannot be held to be a statement written by the defendant No. 1. One witness Baqar Ali Khan (P. W. 2) who deposes that the document is in the handwriting of defendant No. 1, obviously did not know his handwriting well and made contradictory statements as to whether the whole of exhibit 1 was written by defendant No. 1. This witness is moreover a partizan who cannot be relied upon on such a point as the identity of handwriting. The other witness Zawwar Husain (P. W. 9) who has been brought to prove the handwriting is on bad terms with defendant No. 1 and we cannot place much reliance on his testimony. Baqar Ali Khan (P. W. 2) has admitted that the defendant No. 1 is well educated and

can write Urdu correctly. We find that exhibit 9 contains several instances of bad spelling and this furnishes clear evidence that it could not have been written by any one who was well educated and able to write Urdu correctly. Exhibit 2 which was written by Bahadur Ali Khan does indeed show that he could be guilty of grammatical blunders but does not contain such gross errors of spelling as we find in exhibit 9. The manner in which exhibit 9 was produced also rouses suspicion. Plaintiff No. 1 made over all the important documents, which were kept in an iron safe, to defendant No. 1, just after the death of the Nawab Saheb. She says that the defendant No. 1 asked her for exhibit 9 but she could not find it then, but afterwards she found it in a small box and so she retained possession of it. This explanation of the production of exhibit 9 from the custody of plaintiff No. 1 is unconvincing. After considering the evidence as a whole we are of opinion that we cannot place any reliance on exhibit 9 for the purpose of proving the second *muta* marriage.

The learned Advocate for the appellant has relied very strongly upon a decision of their Lordships of the Privy Council in *Shohrat Singh* v. *Jafri Bibi* (1). In that case a *muta* mariage had been contracted and the question was whether a son who was born to the *mutai* wife was legitimate or not. There was no evidence as to the original term for which the *muta* marriage was contracted, but the parties continued co-habitation ever since the time of that marriage. The passage relied upon for the appellant runs as follows:

> "There is no evidence as to the original term for which the *muta* marriage was contracted, but such term, whatever it was, may from time to time have been extended by agreement and in their Lordships' opinion, if it be once proved that the

(1) (1915) 13 AL.J., 113.

1934

MUSAMMAT SABWAR ARA BEGAM v. NAWAB BAHADUR ALI KHAN

cohabitation originated after a *muta* marriage, the proper inference would, in default of evidence to the contrary, be that the *muta* continued during the whole period of cohabitation."

Now it is admitted in this case that cohabitation between the Nawab and the plaintiff No. 1 did originate in a *muta* marriage. It is also proved, and not disputed, that the plaintiff No. 1 continued to live with the Nawab in the same house right up to the time of the latter's death and that Faiz Ali was born in the Nawab's house. We are bound to follow the ruling of their Lordships and must hold that, in default of evidence to the contrary, the *muta* continued during the whole period of cohabitation.

King, C. J. and Nanavutty, J.

The learned Advocate for the respondents has sought to distinguish that ruling on the ground that in that case the original term of the *muta* marriage was not known whereas in the present case it is common ground that the original *muta* was for a period of five years. We do not think that this fact is enough to make their Lordships' dictum inapplicable to the facts of the present case. It appears that their Lordships considered the term of the original *muta* to be immaterial, as such term, whatever it was, might have been extended from time to time by agreement and in their view, if cohabitation between the parties continued, then it should be presumed that the *muta* continued during the whole period of cohabitation. Applying the principle laid down in this observation it must be presumed that the term of the *muta* was extended after it expired in the year 1927 because plaintiff No. 1 certainly continued to live with the Nawab in the same house as his wife after the expiry of that term, and her son Faiz Ali Khan was born in the Nawab's house after the expiry of that term. It remains to be seen whether there are any facts which rebut the presumption of the extension of the term of *muta*.

The respondents rely mainly on the conduct of the plaintiff No. 1 as shown in a number of documents relating to the substitution of names of the heirs of Raza Ali Khan in a suit filed by him and pending at the time of his death. We refer to exhibits A1. A5, A7, A9 and A12. It is clear that the plaintiff No. 1 signed the exhibit A1, which is an application for substitution of the names of the heirs, and that she did so as guardian of her daughter Wazir-un-nisa. The significant point is that she did not claim any right of inheritance on behalf of her second daughter Shaukat Jahan or on behalf of herself as heir of her son Faiz Ali Khan. In the compromise exhibit A12 the heirs of the Nawab were given a decree for money and the heirs did not include either Shaukat Jahan or plaintiff No. 1. It is argued that this conduct clearly shows that the plaintiff No. 1 did not claim any share in the assets of the deceased Nawab either for her daughter Shaukat Jahan or for herself and that therefore she knew that there was no good ground for such a claim. The trial Court has not placed any reliance on these documents as against the plaintiff No. 1 on the ground that she is a *pardanashin* and illiterate lady and that the documents were not explained to her. She states that she was entirely under the influence of the defendant No. 1 and that she signed any document which he brought to her without understanding its meaning or effect. We see no reason to dessent from the view taken by the trial Court on this point.

On the other hand we have certain evidence which does tend to show that the plaintiff No. 1 was regarded and treated as the *mutai* wife of the Nawab right up to the time of his death, and that her children, including her son Faiz Ali Khan, were regarded and treated as the legitimate children of the Nawab.

It is clearly proved that when the plaintiff No. 1 was about to be delivered of her son in the Nawab's house she was attended by a doctor, Dr. Lahiri, and by nurses

1934

MUSAMMAT SARWAR ARA BEGAM v. NAWAB BAHADUR ALI KHAN

King, C. J. and Nanavutty, J.

whose fees were paid by the Nawab. She certainly seems to have been regarded by these persons who attended her as the Nawab's wife.

We may also refer to a letter exhibit 1 written by the defendant No. 1 to his father on the 6th of February, 1928, in which he gives his "respects to Apu Saheba" (the name by which the plaintiff No. 1 was known) and his love to her two daughters. If the plaintiff No. 1 was living with the Nawab merely as a mistress, and if the term of her *muta* had not been extended, we should not expect to find defendant No. 1 sending his "respects" to the lady and her children. This shows that he treated her in the year 1928 as if she were his father's wife. It may be noted that in a previous letter written by defendant No. 1 (exhibit 2) in the year 1926 he sent his "respects to Apu Saheba" in exactly the same terms. At that time plaintiff No. 1 was certainly the *mutai* wife, as the term of the original *muta* had not expired. So it appears that defendant No. 1 treated the plaintiff No. 1 in exactly the same manner in the year 1928 after the original term of *muta* had expired, and this tends to show that the term of *muta* must have been extended. We think it unlikely that the Nawab should allow his *mutai* wife, who had just given birth to a daughter, to sink to the position of a mere concubine or mistress. There is nothing in the evidence to suggest that her status had been lowered in the estimation of the Nawab or of the members or friends of the family.

We find from exhibit 14 that when Faiz Ali Khan was born an entry was made in the register of births of the birth of a son to Raza Ali Khan. Similary when the boy died an entry was made in the death register on the 12th of June, 1929, regarding the death of a son of Raza Ali Khan. There is also evidence to the effect that the boy was buried in the family graveyard. There is also evidence that when the plaintiff No. 1 was seriously sick and was expected to die, soon after giving birth to Faiz Ali Khan, the Nawab had a grave dug for her in

the family graveyard. We do not think that the Nawab would act thus if the plaintiff No. 1 had ceased to be his *mutai* wife and was merely his mistress and if Faiz Ali Khan were merely an illegitimate son. Mehdi Husain (P. W. 1) states that he recorded the birth of Nawab Saheb's third child, namely, Faiz Ali Khan, after going to the Nawab's house. He inquired from the Nawab Saheb who stated *"mere yahan larka hua hai"*. This shows that the Nawab Saheb was ready to acknowledge the boy as his son. Saiyed Mohammad Baqar Ali Khan (P. W. 2) also deposes that the plaintiff No. 1 was the *mutai* wife of the Nawab and continued to be his *mutai* wife until his death. We cannot however place great reliance upon him as he appears to be a partizan of the plaintiff. The testimony of Mr. Usuf Husain Khan, Barrister, deserves more weight. He is a friend of the family having been on the most intimate terms with the Nawab Saheb for the last forty-seven years. He deposes that the Nawab told him about the three children of plaintiff No. 1 that they were born of his *mutai* wife. No reason has been shown why this witness should swear falsely in favour of the plaintiff or against the defendant and we think his testimony is of some weight as showing that the Nawab Saheb acknowledged all three children of plaintiff No. 1 as being his children, presumably meaning his legitimate children.

We may also note that although defendant No. 1 denied the legitimacy of all three children of plaintiff No. 1 the defendants Nos. 2 to 4 adopted a different attitude. They did not deny the legitimacy of the defendant No. 5 or plaintiff No. 2, but merely stated that they had no knowledge of the second *muta* marriage or of the legitimacy of Faiz Ali Khan. The defendant No. 1's denial of the legitimacy of defendant No. 5 throws some light upon the length to which he is prepared to go to defeat the plaintiffs. There can be no doubt whatever regarding the legitimacy of Wazir-un-nisa as the Nawab himself made a declaration on the

1934

MUSAMMAT SARWAR ARA BEGAM v. NAWAB BAHADUR ALI KHAN

King, C. J. and Nanavutty, J.

25th of November, 1926, before the Commissioner, Mr. Cassels, that Musammat Wazir-un-nisa born on the 1st of January, 1925, is his daughter by his second wife Musammat Sarwar Ara. The legitimacy of Wazir-un-nisa has not been seriously contested even in the court below and has not been contested in appeal. Taking the evidence as a whole we find that there is nothing to rebut the presumption that the *muta* was extended right up to the time of the Nawab's death. Such evidence as there is shows that the Nawab treated the plaintiff No. 1 as his wife right up to the time of his death and that he treated Faiz Ali Khan as his son.

In our opinion therefore the appellant has proved the legitimacy of Faiz Ali Khan and we disagree with the learned Subordinate Judge on that point.

A cross-appeal No. 30 of 1933 has been filed on behalf of defendant No. 1. In this appeal he challenged the legitimacy of Shaukat Jahan. We have heard all the arguments addressed to us by the learned Counsel on this point but we have no hesitation in agreeing with the view taken by the trial Court. If the term of the first *muta* is reckoned according to the English calender then Shaukat Jahan was born in lawful wedlock; if reckoned according to the Muslim calendar then she was certainly conceived in lawful wedlock. There is also important documentary evidence in favour of plaintiff No. 2. We find that the Nawab opened two Post Office Savings Bank Accounts, one in the name of Shaukat Jahan and another in the name of his daughter Wazir-un-nisa declaring them both to be his daughters. This is a clear acknowledgment that Shaukat Jahan was his daughter. It may be observed that in the Savings Bank Account he treated her exactly on an equality with Wazir un-nisa who is, as we have shown, unquestionably his legitimate daughter. We think there is no doubt whatever regarding the legitimacy of Shaukat Jahan and we agree with the conclusion and reasoning of the trial Court on this point.

A further point has been raised regarding the finding of the Court below on the issue No. 5. The Nawab got some mortgage deeds executed in the name of his daughter Wazir-un-nisa and it is alleged by the defendant No. 1 that these deeds are *benami* in the name of defendant No. 5 for the Nawab himself. On this point we do not think that the defendant-appellant has been able to make out any good case. It appears that the money which was advanced on the basis of these mortgage deeds was given by the Nawab to the plaintiff No. 1 and was saved by her for the purpose of these loans. Nothing has been shown to us which could make us dissent from the finding of the Court below.

King, C. J. and Nanavutty, J.

The result is that we allow the appeal of the plaintiff No. 1 and decree her suit against all the defendants with costs throughout against defendant No. 1. We dismiss the appeal of defendant No. 1 with costs, but in view of our finding that Faiz Ali Khan was a legitimate son the decree in favour of plaintiff No. 2 will be modified by substituting a 1/9th share instead of a 1/7th share.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice G. H. Thomas

MUSAMMAT GAYA DEI AND OTHERS (DEFENDANTS-APPELLANTS) *v.* MUSAMMAT TULSHA DEI AND OTHERS, PLAINTIFFS AND ANOTHER (DEFENDANT-RESPONDENTS)*

1934 *December* 19

Suits Valuation Act (VII of 1887), *section* 8—*Plaintiff valuing suit at below Rs.*5,000—*Defendant pleading valuation to be over Rs.*5,000—*Court deciding in favour of plaintiff*—*Appeal by defendant*—*Valuation for purposes of determining forum is plaintiff's valuation*—*Hindu Law*—*Widow's estate*—*Partition between co-widows*—*Survivorship*—*Relinquishment of right of survivorship, if valid*—*Co-widows*—*Aliena-*

*First Civil Appeal No. 58 of 1933, against the decree of Pandit Dwarka Prasad Shukla, Additional Subordinate Judge of Gonda, dated the 23rd of December, 1932.