

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

MOHAMMAD HAYAT AND OTHERS (PLAINTIFFS)

Appellants

versus

MOHAMMAD NAWAZ AND

OTHERS (DEFENDANTS)

MOZAFFAR KHAN AND

OTHERS (PLAINTIFFS)

} Respondents.

Civil Appeal No. 1934 of 1933.

Muhammadan Law—Marriage—during period of iddat—whether fasid or batil—Legitimacy of children.

Held, that according to Muhammadan Law a marriage contracted during the period of *iddat* is only a *fasid* (invalid) marriage and not *batil* (void), and the children of such marriage must be held to be legitimate.

Taliamand v. Muhammad Din (1), *Tajbi Abalal Desai v. Mowla Khan* (2), *Mohammad Shafi v. Raunag Ali* (3), and *Mussammatt Kaniza v. Hasan Ahmed Khan* (4), relied upon.

Other case law, referred to.

First appeal from the decree of Sayyed Zul-Fikar-ud-Din, Subordinate Judge, First Class, at Sargodha, District Shahpur, dated the 21st March, 1933, dismissing the plaintiffs' suit.

GHULAM MOHY-UD-DIN and MOHAMMAD AMIN,
for Appellants.

R. C. SONI, for Respondents.

The judgment of the Court was delivered by—

. ADDISON J.—The plaintiffs, who are collaterals of Amir Khan, deceased, sued for a declaration that defendants Nos. 1 and 2 were not the legitimate sons of Amir Khan and that after the death of Amir Khan's widow, *Mussammatt Ghulam Bibi*, they and certain defendants, who did not join in the suit, would be

(1) (1931) I. L. R. 12 Lah. 52.

(3) (1928) 107 I. C. 882.

(2) (1917) I. L. R. 41 Bom. 485.

(4) (1926) I. L. R. 1 Luck. 71.

entitled to Amir Khan's land. It was stated that *Mussammât* Fateh, mother of defendants Nos.1 and 2, used to live in Amir Khan's house, but that her *nikah* with Amir Khan was invalid on the ground that it had been contracted during the period of *iddat*. There was also a suit instituted by the same persons for a declaration that a gift of land made by Amir Khan to defendant No.1 in 1926 should be declared void on the ground that the land was ancestral and Amir Khan was not competent to make the gift. Both these suits were dismissed and the plaintiffs have preferred an appeal only in the suit for a declaration that defendants Nos.1 and 2 are not the legitimate sons of Amir Khan and that the reversioners would be entitled to succeed to the property left by Amir Khan on the death of his widow. *Mussammât* Ghulam Bibi.

Mussammât Fateh, mother of defendants Nos.1 and 2, was divorced by Sardara on the 21st March, 1926. Amir Khan married her on the 7th May, 1926, so that the marriage was undoubtedly contracted before the expiry of the *iddat* period. It is clear from the evidence of Sardara, her first husband, that *Mussammât* Fateh had left his roof 9 to 10 months before he divorced her, while defendant No.1, Muhammad Nawaz, was born on the 20th August, 1926, about five months after her divorce.

All the commentators on Muhammadan Law, e.g. Tyabji, Wilson, Amir Ali and Mulla are in favour of the legitimacy of the children of *Mussammât* Fateh on the ground that the marriage was merely invalid and not void.

In *Aizunnissa Khatoon v. Karimunnisa Khatoon* (1) it was held that marriage with the sister of a wife

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was void and that the children of such a marriage were illegitimate and could not inherit. The same view was taken by Karamat Hussain J. sitting alone in *Ata Muhammad Chaudhry v. Mst. Saiqul Bibi* (1). He held that "in order to determine the legal nature of a marriage contract, one has to look to the time at which it was entered into and not to any subsequent time."

The learned counsel for the appellants based his argument on these two authorities and went so far as to contend that the distinction which the Muhammadan jurists had drawn between *fasid* and *batil* marriages was incorrect and should not be recognized. It is much too late, however, in the day to set up this contention.

In *Taliamand v. Muhammad Din* (2) a Division Bench held that "under the Muhammadan Law governing the *Hanafi* sect, marriage with a wife's sister during the subsistence of the previous marriage with her sister was only invalid (*fasid*) and not void *ab inito* (*batil*), and the issue of such marriage was legitimate and inherited the father's property." This is a similar case to the present, the learned commentators placing a marriage during the *iddat* period in the same category as a marriage with a wife's sister.

In *Tajbi Abalal Desai v. Mowla Khan Ali Khan Desai* (3) the same view was taken by Sir Basil Scott C. J. and Beaman J., *Aizunnissa Khatoon v. Karimunnissa Khatoon* (4) was dissented from.

Mohammad Shafi v. Ranaq Ali (5) is a decision of a Single Bench of the Oudh Chief Court and is on

(1) (1910) 7 I. C. 820.

(3) (1917) I. L. R. 41 Bom. 485.

(2) (1931) I. L. R. 12 Lah. 52.

(4) (1896) I. L. R. 23 Cal. 150.

(5) 107 I. C. 882.

all fours with the present case. It was held there that a marriage contracted within the period of *iddat*, being only a *fasid* marriage, could give rise to a right of inheritance between married parties.

Mussammatt Kaniza v. Hasan Ahmed Khan (1) is a decision on all fours with *Taliamand v. Muhammad Din* (2) and *Tajbi Abalal Desai v. Mowla Khan Ali Khan Desai* (3) and in it also *Aizunnissa Khatoon v. Karimunnissa Khatoon* (4) was dissented from.

Another case which was referred to is *Khurshuid Jan v. Abdul Hamid Khan* (5), where a Division Bench held that according to Muhammadan Law a marriage with a fifth wife in presence of four living wives was merely invalid, but not void, and consequently the children of such marriage were legitimate and entitled to succeed as lawful heirs to their father. According to the learned commentators this kind of marriage comes within the same category as the marriage in question in this case.

Reference was made by the learned Counsel for the appellants to *Jhandu v. Mst. Husain Bibi* (6), where it was held that a marriage, contracted by a widow during her *iddat* period, was void. This was a suit for restitution of conjugal rights and the lady was entitled to set up the defence that the marriage, if any, was invalid and not binding upon her. This authority, therefore, does not appear to be in point and the same remark applies to *Ilahia v. Imam Din* (7).

At the hearing of the appeal an affidavit made by Sultan Khan was put in to the effect that the family of

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(1) (1926) I. L. R. 1 Luck. 71. (4) (1896) I. L. R. 23 Cal. 130.

(2) (1931) I. L. R. 12 Lah. 52. (5) 6 P. R. 1908.

(3) (1917) I. L. R. 41 Bom. 485. (6) (1923) I. L. R. 4 Lah. 192.

(7) 29 P. R. 1909.

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the parties was governed by Shia Law and not by Hanafi Law. This assertion is an afterthought and was put forward at this late stage because, it is alleged, the Shia Law differs from the Hanafi Law in the matter in dispute in this case. But it was at no time a part of the case of the appellants that they were governed by Shia Law and there was no pleading to that effect. It was impossible to allow this plea to be taken at this stage.

There is, therefore, no doubt that the children of *Mussammat* Fateh by Amir Khan, namely, defendants Nos.1 and 2, must be held to be legitimate sons of Amir Khan and entitled to inherit his estate, although the marriage contracted by their mother with Amir Khan was an invalid or *fasid* marriage. The appeal must be dismissed, but no order will be made as to costs.

P. S.

Appeal dismissed.
