1902.

SHARFUDIN v. GOVIND.

is a still later development, and Tajudin, the appellant-plaintiff, has not been given a proper opportunity to meet the new case thus brought forward for the defendants 7-10. For the above reasons I concur entirely in the view that this appeal cannot be decided on the ground that plaintiff was at the time of his purchase fixed with the knowledge of the charges purporting to be created by Exhibits 57, 58, 59 until the plaintiff has been given the opportunity to show whether at the time of his purchase from defendant 1 he did make inquiries as to the possession of defendants 7-10, and with what result, so that it may be ascertained whether he was offered the same information as that given in the written defence of defendants 7-10 and was misled or put off his guard as to the nature and extent of the rights of defendants 7-10.

Issue sent down.

PRIVY COUNCIL.

HAJI SABOO SIDICK AND OTHERS (DEFENDANTS) *v.* AYESHABAI AND ANOTHER (PLAINTIFFS).

P. C.*
1903.
March 19 *and April* 30.

Hindu law—Cutchi Memons—Marriage, evidence of, where disputed—Omission to mention nika wife in will made after marriage—Unchastity of widow as disentitling her to maintenance—Charge not specifically raised in pleadings or issues.

The omission, in a will made after an alleged *nika* marriage, of all mention of the *nika* wife, is, so far as it goes, an item of evidence against the marriage having taken place; but its cogency must depend on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. In this case it was *held* that the circumstances of the marriage made it not unlikely that the testator would have taken the latter course.

A draft of the will, written by a person other than the testator, tendered as furnishing similar evidence to that afforded by the will, was held to be rightly rejected as evidence, not being a written statement by the testator.

* *Present*: LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

1903.

HAJI SABOO SIDICK v. AYESHABAI.

A charge of unchastity as disentitling a widow to maintenance must be specifically raised in the pleadings or issues. Where there was no averment of, nor issue as to such unchastity, it was *held* that the defendants could not found any such allegation on their general denial in the pleadings that the plaintiffs (the widow and her daughter) were entitled to maintenance, and on an issue "whether the plaintiffs are entitled in any event to maintenance or marriage expenses."

APPEAL from a decree (28th February, 1901) of the High Court at Bombay, varying a decree (3rd July, 1900) of the same Court in its original jurisdiction.

The suit out of which the appeal arose was instituted on 30th September, 1899, by the respondents Ayeshabai and Mariambai, who were Mahomedans, alleging themselves to be the widow and daughter, respectively, of one Haji Haroon Sidick, and in that capacity making claims on his estate.

Haji Haroon Sidick was a Cutchi Memon, a member of a class of persons who being originally Hindus became converts to Mahomedanism, but retained the Hindu law of inheritance.

The defendants were Haji Saboo Sidick and Haji Adam Sidick (the two brothers of Haji Haroon Sidick), Rahimtoollah Abd Rahim, Abdulla Abd Rahim, and Fatmabai (admittedly a widow of Haji Haroon Sidick).

The plaint stated that Haji Haroon Sidick died on 20th December, 1898, possessed of considerable property, of which the first four defendants were in possession. The plaintiffs claimed that the two widows were entitled to the whole of the estate, after provision being made for the maintenance and marriage expenses of Mariambai. In the alternative they claimed to be entitled to a share of the estate, or in any case to maintenance out of it.

The defendants filed a joint written statement, in which they denied that the plaintiffs were the wife and daughter of Haji Haroon Sidick and asserted that the defendant Fatmabai was the only widow. They set up a will and codicil of the deceased, of which the first four defendants were the executors, in which there was no mention of the plaintiffs, and under which the defendant Fatmabai was entitled to certain legacies in her favour. The defendants denied that the plaintiffs had any claims, as alleged, to the estate of the deceased testator.

It was proved that the will and codicil set up by the defendants were duly made by the deceased, and that is not in dispute in this appeal.

The only issues now material are:

1. Whether the first plaintiff is the widow and the second plaintiff the daughter of the deceased, as alleged?

5. Whether the plaintiffs are entitled in any event to maintenance or marriage expenses, and if so to what amount out of the estate?

6. Generally.

The Judge of the High Court in its original jurisdiction (Russell, J.) held that the first plaintiff was the widow, and the second plaintiff the daughter, of Haji Haroon Sidick; that the former was entitled to maintenance from 20th December, 1898, at Rs. 375 a month; and he allowed Rs. 2,000 for the marriage expenses of the latter, to be deposited with the Accountant General to the credit of a fund in her name and invested in Government paper, to be paid with its accumulated interest to her guardian at such time as she was to be married: in the event of her death that sum and the interest to be repaid to the defendants. The maintenance was declared to be a charge on the immoveable property of the testator. With reference to the question of maintenance, the Court said:

I was asked to raise an issue on unchastity. I declined to allow it for three reasons. It was sought to be raised almost at the end of defendants' case. I should have been obliged to re-hear the whole case to enable plaintiff to disprove facts. That would have been an injustice and waste of public time. Evidence has been directed to prove plaintiff was a prostitute. This was only relevant on the question whether the marriage was probable or not. Having held that the issue of unchastity could not be raised, I allowed no evidence to be taken about it.

From this decision both parties appealed: the defendants on the ground that the Court was not justified in finding on the evidence that the plaintiffs were wife and daughter of the deceased; that it was not proved that a *nika* marriage took place between the deceased and Ayeshabai; that it ought to have been held that Ayeshabai was leading the life of a prostitute at the date of the alleged marriage; that the Court was in error in excluding evidence tendered by the defendants to prove that

1903.

HAJI SABOO SIDICK v. AYESHABAI.

she continued to lead the life of a prostitute after the alleged marriage and after the death of the testator; that the amount of maintenance awarded was excessive and ought to be reduced; that maintenance should only be paid to her during widowhood and so long as she remained chaste; and that the Rs. 2,000 awarded to the second plaintiff was excessive and ought to be reduced.

A Bench of the High Court (Candy and Whitworth, JJ.) sitting to hear appeals from the original civil jurisdiction of the Court affirmed the finding of Russell, J., that Haji Haroon Sidick had contracted a *nika* marriage with Ayeshabai and that she was his wife at the time of his death. They also held (referring to *Mahomed Sidick* v. *Haji Ahmed* [1] per Scott, J., at page 13 of the Report), that Haji Haroon Sidick as a Cutchi Memon was governed by Hindu law, and according to that law Ayeshabai was entitled to maintenance even though she had been unchaste before and after marriage. As to this and as to the quantum of maintenance suitable, they said:

> The learned counsel for defendants contended that Ayeshabai was entitled to no maintenance at all because Haji Haroon could at any time have divorced her. But that is no answer to the plaintiffs' claim. The question is not what Haroon could have done, but what he did do. As a fact he did not divorce her, and she was his *nika* wife at the time of his death. Therefore, according to Mahomedan law, she would be one of his heirs, while if she cannot inherit according to Hindu law she is entitled to maintenance. So, too, with the argument that Ayeshabai had led an unchaste life before and after her marriage. The fact, if established, might be an argument in favour of the heir that it was not probable that Haroon would have married her. But if as a fact he did marry her, and did not divorce her, she is entitled to maintenance, whatever may have been her past life.
>
> Now, no doubt, in considering the quantum of maintenance to be allowed to Ayeshabai the main element to be considered is the value of Haroon's estate, and when, as here, there is a Master attached to the Court, the usual course is a reference to the Master. But this is not imperative, and we are reluctant at this stage to protract the litigation by a reference unless that course is absolutely necessary. There is nothing on the record to show that a reference was directly asked for. The learned Judge took the estimate which was given by the managing clerk of Haroon's solicitors, which agrees with the value given in the will. Taking the estate at nine lakhs the learned Judge allowed one-third, *i.e.*, three lakhs, to the two widows, giving half, *i.e.* Rs. 1,50,000, to Ayeshabai. The

(1) (1885) 10 Bom. 1 at p. 13.

interest of that at three per cent. would amount to Rs. 4,500 or Rs. 375 per mensem. The learned counsel for defendants admitted that Haroon was a very wealthy man, and he said that it might be assumed that the estate was at least worth five lakhs. We do not think it necessary that there should be any further investigation as to the value of the estate. For there are other elements to be considered which, in our opinion, necessitate a considerable reduction of the amount allowed by the learned Judge. It is obvious that Ayeshabai is not in the same position as the senior widow Fatmabai, who was the *shadi* wife of Haroon, who lived with him in his own house as his acknowledged wife, and who enjoyed far greater comforts than Ayeshabai, the *nika* wife, whose marriage was concealed from the world and who lived in hired rooms in a humble condition of life.

The evidence as to status of Ayeshabai is so clear that we have no hesitation in saying that the sum of Rs. 200 per mensem is an ample allowance for her and her daughter, and that, when the daughter is married, this allowance should be reduced to Rs. 150, which will be amply sufficient to maintain Ayeshabai decently and with due regard to her position which she enjoyed as the *nika* wife of the deceased.

We think also that there should be a direction in the decree that Ayeshabai's maintenance will cease on her re-marriage, should she re-marry, and that it is conditional on her remaining chaste.

As to the marriage expenses of the daughter, we are not disposed to interfere with the direction of the learned Judge. There is certainly no reason to increase the sum.

Sir W. Rattigan, K.C., and *H. Cowell* for the appellants contended that the alleged marriage between Haji Haroon Sidick and Ayeshabai was not sufficiently proved. Had she been his wife, and Mariambai his daughter, they would have been mentioned in his will, which makes no mention of them. The draft of the will tendered in confirmation of this should have been admitted in evidence. But, assuming the marriage did take place, Ayeshabai's claim to maintenance has been forfeited by her unchastity. There was, it is true, no specific issue as to her having been unchaste; but, it was submitted, the denial in the pleadings that she was entitled to maintenance, and the fifth issue "whether the plaintiffs are entitled in any event to maintenance or marriage expenses," enabled the appellants to show any ground for depriving her of it. When the first Court held that this could not be done, the appellants should have been allowed to raise a specific issue, and evidence of the unchastity ought not to have been excluded. The amount of maintenance

1903.

HAJI SABOO SIDICK v. AYESHABAI.

and of the allowance for marriage expenses was excessive and should be reduced.

J. Jardine, K.C., and *C. W. Arathoon* for the respondents were not heard.

The judgment of their Lordships was on the 30th April, 1903, delivered by—

LORD ROBERTSON:—The respondents were the plaintiffs in a suit brought to assert their rights as one of the widows and a daughter, respectively, of one Haji Haroon Sidick, a merchant of Bombay, who died on 20th December, 1898. The plaint was filed on 30th September, 1899. It originally raised, *inter alia*, the question whether Haji Haroon Sidick died intestate, but it is not now disputed that he left a will, under which the appellants, other than Fatmabai, are the executors. Fatmabai is admittedly a widow of the deceased. The appellants on 24th November, 1899, filed a joint written statement, and issues were settled on 18th June, 1900.

The main question raised by the plaint was whether the deceased had entered into a *nika* marriage with the respondent Ayeshabai. This was keenly disputed, the case of the appellants being that at the alleged marriage ceremony the deceased had been personated. On this pure question of fact there are concurrent judgments in favour of the respondents; and accordingly their Lordships have not been invited to reconsider its merits. The appellants confined their argument to four matters, the first of which is, in truth, inseparable from the merits:

1. At the trial it was proved that the deceased had executed a will, after the alleged marriage, and in it there was no mention made of either of the respondents. So far as it goes, this is an item of evidence against the marriage having taken place; but, at best, it is only an item more or less cogent, and its cogency must depend on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. In the present instance the Courts below have thought that the circumstances

of this marriage made it not unlikely that the testator should take the latter course. It is obvious not only that this is a very tenable view of the question, taken by itself, but also that the point raised by the appellants could only be made anything of by weighing it in relation to the whole evidence on which the Courts below have concurrently preferred the respondents' contention.

2. A draft of the will, also containing no mention of the respondents, was tendered in evidence, apparently as of itself furnishing similar evidence to that afforded by the will. This draft, however, was written not by the testator but by another person, and in their Lordships' judgment it was rightly rejected. This was not a written statement made by the deceased.

3. At the trial, questions were put and disallowed, which went to show that Ayeshabai had been unchaste after the death of her husband and had thus (as the appellants contended) disentitled herself to maintenance. On the record as it stood, the appellants had neither averment nor issue of such unchastity, and all that they could point to was their denial that "the plaintiffs" were entitled to maintenance, and the fifth issue, whether "the plaintiffs are entitled in any event to maintenance or marriage expenses." It is manifest that those general words, equally applicable to mother and child, are entirely unsuitable for the statement of the specific fact of incontinence on the part of the mother, and the words of the fifth issue are in fact an echo of the plaintiffs' own pleading.

The appellants sought to better their position by applying for leave formally to raise the issue whether, in the event of the plaintiff Ayeshabai being entitled to maintenance from the date of the deceased's death, she has not forfeited such right by unchastity; and, on this application being refused, the appellants applied for leave to file a supplemental written statement raising the question of unchastity. Both applications were refused. Both were made after the plaintiffs' case was closed. It appears to their Lordships that it was out of the question that, after the plaintiffs' case was closed, this new averment should be made, necessitating as it did the opening up of the whole case, without any suggestion that the facts relied on had newly come to the knowledge

1903.

HAJI SADOO SIDICK v. AYESHABAI.

of the appellants and had before been excusably unknown to them.

The proposal that this matter should now be re-opened is the more unreasonable as the decree appealed against contains a *dum casta* clause.

4. The only other point was as to the amount of aliment. No cause whatever has been shown for interfering with the careful decision immediately under review, which modified the decree of the Judge of first instance.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants—*Messrs. Payne and Lattey.*

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

PRIVY COUNCIL.

P. C.*
1903.
April 28, 29.
May 12.

VERABHAI AJUBHAI AND OTHERS (PLAINTIFFS) *v.* BAI HIRABA AND OTHERS (DEFENDANTS).

Hindu Law—Adoption—Chudasama Gameti Garasias—Custom prohibiting adoption—Effect on adoption of the natural son having survived his father and attained ceremonial competence.

A custom alleged to exist in the Hindu caste of Chudasama Gameti Garasias prohibiting adoption was held to be not proved.

A member of that caste died in 1887 leaving a widow and a son, who died in 1889 between fifteen and sixteen years of age and unmarried. In 1891 the widow adopted a son to her husband.

Held, that the adoption was valid.

It was contended that the adoption was invalid on the ground that the natural son had survived his father and lived to attain ceremonial competence. Both the Courts below found that he was a minor and unmarried when he died.

Held, that as there appeared to be no fixed age at which a Hindu boy was supposed to have attained ceremonial competence, and as there was no proof in

* *Present*: LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, and &c. SIR ARTHUR WILSON.