

(1915) 10 MAD CK 0051
In the Madras High Court

Akbar Hussain Sahib and Another

APPELLANT

Vs

Shoukhah Begam Saheba (Died) and Others

RESPONDENT

Date of Decision : 18-10-1915

Acts Referred:

Citation : AIR 1916 Mad 152 : 31 Ind. Cas. 657 : (1915) 2 LW 1191

Hon'ble Judges : Srinivasa Aiyangar, J; Coutts-Trotter, J

Bench : Division Bench

Judgement

Coutts-Trotter, J.—This is an appeal by two youths, who are the sons of a lady called Mahfil Nagir Bee. They bring this action against a number of relatives of the late Nawab of Masulipatam, as he was called by courtesy, to have it declared that they are the legitimate sons of the late Nawab and entitled to take part in the partition of his landed property.

2. The question that has to be determined can be put in two ways. In the first place, has it been affirmatively shown that Mahfil Nagir Bee was a wife of the late Nawab? Secondly, it may be put in another way--do the known circumstances of the relations of the Nawab and his family to Mahfil Nagir Bee lead to the presumption that a marriage must have taken place, though no definite date can be assigned?

3. The first question, therefore, is one of fact--is it true or is it proved that a marriage actually took place between the Nawab and this lady? If she was married to the Nawab, it is not contended that she was married in any other form except the lowest form of marriage known to Muhammadan Law, viz., muta, marriage, which is said by some to be so low a form of union as to be practically indistinguishable from concubinage. The two known features about it are: first, there must be a definite period for the marriage to last either in this world or in the next or in both--which in this case is said to be 99 years--and secondly, a sum of money must be paid to the bride as her dower--and it is said in this case that a sum of Rs. 525 was paid to this girl. The history of Mahfil Nagir Bee is inevitably bound up with that of another lady, called Dildar Bee, who

was a witness in this case. They were acquired from their parents, who were poor and unknown, by the senior wife of the Nawab, when they were little children six or seven years old. Their parentage seems to be very vaguely known to anybody, including themselves. There were apparently Hindus and pariahs by caste, and became converted to Muhammadanism after their introduction into the zenana of the Nawab. In the year 1887, the shadi wife of the Nawab was taken ill, and after a few weeks' illness, she died in child-birth. That we know to be on the 26th November 1887. The story told by the appellants is that shortly afterwards--a few weeks after the death of the shadi wife--the Nawab proceeded in turn to contract muta marriages with both Mahfil Nagir Bee and Dildar Bee; and it seems clear that more or less about the same time, he did no doubt contract a muta marriage with another young woman in the zenana, namely Fiza Bee. Several witnesses were called for the appellants to establish the alleged celebration in Madras of the muta marriage with Mahfil Nagir Bee. Most of the witnesses identified the occasion by reference to some other events. One of the events by which some of them tried to fix it, is by reference to the marriage of a lady, called Amthus Salam Begam, who is the 5th defendant in this case. They say Dildar Bee and Nagir Bee's marriages were a little before that of Amthus Salam. But, unfortunately, the marriage register has been produced and it turns out that that marriage was not celebrated till the year 1892; and, therefore, these witnesses must, at any rate, be entirely mistaken when they imagined themselves to be consistent in fixing the occasion of the marriage of Mahfil Nigar Bee with reference to that of Amthus Salam Begam. Another method of identifying, adopted by some other witnesses, was by reference to the marriage of Fiza Bee, and those of them who adopted this method are all agreed that, of the three girls, Fiza Bee was the one married last. A letter which was produced--Exhibit XXXII--a letter written by the Nawab to a friend, is dated 17th April 1887, and it specifically recites, that on that date, he had just married Fiza Bee as muta wife. After that, it becomes impossible to place any reliance on these witnesses, as it is clear on their own showing that it was more than six months out by this last method, and five years out by the other method of fixing it by the marriage of Amthus Salam Begam.

4. But, apart from these special difficulties, the general tenor of the story bristles with improbabilities. Although this took place in Madras, where the Nawab had a house and he was apparently very well known in the society of his equals, every single witness that speaks to the marriage comes from Masulipatam having lived there all his and her life, as the case may be, and just happening by some happy coincidence to make a journey to Madras, in time to witness this ceremony. Not a single witness is called who was present on the occasion and who is a native of Madras. For this, the explanation is suggested that natives of Masulipatam would be the only persons whom the plaintiffs would probably be in a position to influence to invent the story of the marriage. The learned Judge has heard all the witnesses and weighed all the documents and he has come to the conclusion that this alleged marriage is not proved to have taken place, and from, that

conclusion, I do not dissent.

5. Next comes the much more important question, whether, although it has not been specifically proved as at a definite date, the circumstances in this case are such that the law will presume that a marriage between these persons took place. I do not propose to deal with this matter at very great length; but we have had long and learned arguments about it; and out of respect to them, I will refer to some authorities that were cited. I refer to the authorities for the purpose of ascertaining on what conditions, what evidence and what proof rests the presumption which undoubtedly is to be found in Muhammadan Law with regard to legitimacy in certain cases. The first case is *Khajah Hidayut Oollah v. Rai Jan Khanum* 3 M.I.A. 295 : 1 Sar. P.C.J. 282 : 18 E.R. 510. In that case, there was cited in argument a passage from Macnaghten's Muhammadan Law, and that was emphasised in the judgment. That passage is to this effect: None but children who are in the strictest sense of the word spurious, are considered incapable of inheriting the estate of their putative father. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short, where by any possibility a marriage may be presumed, the law will rather do so than "bastardize the issue, and whether a marriage be simply voidable or void ab initio, the offspring of it will be deemed legitimate." Having quoted this passage, their Lordships say on page 318: The effect of that appears to be, that where a child has been born to a father of a mother, where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan Law, the presumption is in favour of such marriage having taken place;" and on page 322, they summarise the state of facts, which they held in that case as sufficient to invoke the presumption of law, thus: Now all the facts which are there stated, upon the principle of: assumption, appear to us, to be maintained by the evidence in this case; namely, that Musammat Raijan did associate with Fyz Ali Khan; that she did remain with the females of the house of Fyz Ali Khan; that Saadat Ali Khan was born of her ventre and as to his being the offspring of Fyz Ali Khan, we think that is a circumstance necessarily to be inferred from the previous facts."

6. The next case of importance was decided in *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan* 11 M.I.A. 94 7 W.R. 1 : 1 Suth. P.C.J. 659 : 2 Sar. P.C.J. 223 : 20 E.R. 37. In that case, their Lordships considered the earlier case and considerably modified the extent of the doctrine there laid down; and they cited a passage, which has been quoted at the Bar, from a certain book on Inheritance by Mr. Bailey as making the broad assumption that mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This statement drops the important qualification "with acknowledgment." I should mention that the word "questioning" in the report is a mistake for "making." Their Lordships go on: "No decision can be found there (that is, of the Privy Council) which supports so broad an assumption, or which, when rightly understood, is in conflict with the law as

stated by the Priests in this case. The presumption of legitimacy from marriage 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" and so forth. Then they go on: These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the ground of legitimacy by confounding concubinage and marriage." Then they quote a passage from another case cited before us, Mahomed Banker Hoossain Khan Bahadoor v. Shurfoon Nissa Begum 8 M.I.A. 136 : 3 W.R. (P.C.) 37 : 1 Suth. P.C.J. 400 : 1 Sar. P.C.J. 728 : 19 E.R. 481, and then they explain the passage in Khajah Hidayut Oollah v. Raigan Khanum 3 M.I.A. 295 : 1 Sar. P.C.J. 282 : 18 E.R. 510 which I have already referred to, and they say this: The cohabitation alluded to 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. The presumption throughout the whole judgment is treated as one of fact.

7. "it would be much to be regretted if any variance on this important matter arose between the decisions of the Courts and the text of the Muhammadan Law of legitimacy, as understood and declared by the High Priest, connected as their law and religion are. Such a variance exists between the law as expounded in this case and the position contained in Mr. Campbell's judgment, that mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring;" and, therefore, they adhered to the stricter view of the law which they had understood to be endorsed by the Muhammadan Priests, namely, that besides cohabitation and besides proof of parentage, there must be something in the nature of acknowledgment, either expressly or by conduct, on the part of the reputed father, to raise the presumption of legitimacy. But, given these facts, then their Lordships are ready to apply the presumption.

8. The next case of importance is Ranee Khujooroonissa v. Musammat Roushun Jehan 3 I.A. 291 : 2 C.P 184 : 26 W.R. 36. On page 311 they discuss the same question (under different circumstances) as is discussed in this case, whether a lady called Bibee Loodhun is a concubine or a wife. They say: "It is an undisputed fact that Nuzeroodeen, the son of Bibee Loodhun, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasion recognised by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances, appear to have been laid down in Khajah Hidayut Oollah v. Rai Jan Khanum 3 M.I.A. 295 : 1 Sar. P.C.J. 282 : 18 E.R. 510, and then they quote a passage from that judgment; and their Lordships observe, on page 312: It appears to their Lordships, therefore, that the undoubted acknowledgment by

the father and by the whole family of the legitimacy of Nuzeeroodeen raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted." Then they discuss the evidence as to that and come to the conclusion that they are not justified in holding the presumption rebutted. That is quite consistent with the judgment of the Privy Council in *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hussein Khan* 11 M.I.A. 94 7 W.R. 1 : 1 Suth. P.C.J. 659 : 2 Sar. P.C.J. 223 : 20 E.R. 37, because in that case, there was evidence of acknowledgment not only by many members of the family, but by the alleged husband and father himself.

9. Approaching the facts of this case in the light of these decisions, what do we find? The plaintiffs evidence is almost silent as to what happened to Mahfil Nagir Bee after the year 1887. She must have passed herself, so far as anything is known about her, either as a wife or a concubine of the Nawab. Plaintiffs, I suppose, elected to rely upon their story of a definite and specific marriage. The defendants' witnesses, when they were talking about Mahfil Nagir Bee at all, were only occupied in trying to make out a charge of adultery against the Nawab; and with regard to what took place inside the palace house of the Nawab, with regard to his treatment of the lady, with regard to his and anybody else's treatment of the children, we are left in almost entire darkness. A few sentences are laboriously picked out from the evidence of the witnesses, but they really amount to almost nothing. There is a statement by the eldest shadi son, Hussain Ali, in his deposition: "Mahfil Nagir Bee and Dildar Bee were living with us at Madras, till my father's death." That is all that the learned Vakil for the appellants can pick out of the evidence which directly bears on the relations between these ladies and the Nawab, with one exception, and that is the evidence of Dildar Bee, the other lady, who is in the same position as Mahfil Nagir Bee, whose children are threatened with bastardy--and of course she has the strongest possible motive for making out the position as favourable to the appellants; further, she herself brought a suit on behalf of her children for exactly the same purposes as the present appellants bring this suit. Undoubtedly she says that they were treated by the Nawab as the children of his wives; because that is the plain meaning of the answer given in the examination-in-chief. That is all there is for inferring what took place between, let us say, 1887 and 1898 when the Nawab died. But there are some documents in the case which undoubtedly have a very material bearing on what conclusion we are to come to on this matter; because, although it may be difficult to act on the conduct of other members of the family without any evidence of recognition by the father, nevertheless, speaking for myself, if I find very strong and clear and consistent evidence of recognition by the other members of the family, I would be content to accept very slight evidence as to the father himself. It becomes necessary, therefore, to see how that matter stands. And the first document of importance, in my judgment, is the Government order of the 8th October 1900, which is Exhibit XI. What had happened was this. The family of the Nawab wished to have pensions allotted to them. He having himself actually got a

Government political pension, his family were now anxious to get it; and claims were put in to the Collector by the various members of the family, and finally a pension list was drawn up showing what share each was to get. In that petition to the Collector, it was stated quite clearly that the late Nawab had a muta wife, called Fiza Bee, and two concubines and children. The two concubines can only mean and do mean Dildar Bee and Mahfil Nagir Bee; and in the schedule showing the amounts payable, they are, in terms, described as concubines and their children as children of concubines. It is not possible to say that Mahfil Nagir Bee must have so described herself and I do not think Mr. Rangachariar will go as far as that. But it is impossible for me to believe that the Collector would have written down a conclusion that there were two concubines, unless at any case that was reflecting the view of the family generally. Nodoubt that certainly does not bind the children. I would even say that it is useless as indicating the ladies' own view of their position. But it indicates in the strongest way what must have been the general view of the family as a whole, so that we start with the very first document in the family endeavouring to explain her position and describing her as a concubine.

10. The next document of importance is Exhibit 0, which is dated 23rd May 1902 and which is a power-of-attorney given to a trader for the purpose of getting him to manage some of the properties of the family; and that document is very much relied upon by the appellants, because they are there treated as members of the family and as heirs to the Nawab. At the same time it is just to observe that there is a distinction made in the document between children of muta wives and a word, which apparently is capable of many meanings, the word "kavaz". That word has been the subject of great discussion and considerable amount of research has been expended by the learned Counsel in trying to see what it really means. I am not sure I am very much the wiser, but no one can read the document without seeing this--that there is a distinction between daughters of the muta wife and the children of somebody else. Let the other word be what it will, the distinctions" drawn between the child of a muta the shadi wife and the nicka wife have already been mentioned and then it goes on to distinguish between children of the muta wife and children of the kavaz. It is very difficult to come to any other conclusion than that the last word must be intended to mean a woman who is not married at all: and that, at any rate, is a possible meaning of the word "khowas."

11. The next document to which I would refer is Exhibit XXXIV, dated 27th May 1902. The family by this time were quarrelling, for the most part, with the eldest son, Hussain Ali, and approached the Governor with a view to get Hussain Ali out of the management of the family properties and place the management in the hands of somebody else on behalf of the family as a whole. The importance of that is that, in that document, although Akbar Hussain and Asghar Hussain are included as heirs or at any rate as claimants, they are described as being the minor sons, etc., by a concubine. Once more I do not for a moment suppose that that can, in any way, be brought home to the knowledge of Mahfil Nagir Bee. The

probabilities are that she is not in any way responsible, but the second son is responsible for it. But what I once more think it important for is that it does show that at this time the family or the spokesman, for the time being, of the family seemed to take it as a matter of absolute common denomination that her position was not that of a wife, but only of a concubine. I have already mentioned the fact that about this time when the memorial was sent, there was a quarrel between Hussain Ali and the other members of the family. There are some, other documents on which great reliance is placed by the appellants. In the first place, a number of persons sued the descendants and representatives of the Nawab and added the present appellants as defendants along with the other members of the family; and it is said that not only was that done--which perhaps does not go for very much--but first the eldest son, Hussain Ali, and in later litigation, the senior daughter were guardians for these minors. That is a strong circumstance, so strong that, at one time, I was almost inclined on the faith of it to accept the appellants' case. But I think it loses a great deal of its force by reason of two circumstances. The first is that when these documents are read with the other documents to which I have referred, a quite different view appears to be taken by the same people, and the plaintiffs are treated as sons of a concubine and nothing else. Still more do I think it greatly modified by the fact that this attitude begins to be taken up for the first time only after the dissensions and quarrels have arisen in the family. There is no doubt that various members of the family were on very bad terms with one another, and that the daughter who supported the two ladies' cases was ready to grasp at any support she could get from any member of the late Nawab's household. On the whole, I do not think that the evidence of subsequent recognition of legitimacy by the other members of the family is strong enough to outweigh the complete mystery in which the lives of these people are wrapped up down to the end of the life of the Nawab; and I think it quite unsafe to give the rein to mere conjecture and come to the conclusion that there is enough material to find that they are legitimate sons. I think it is unfortunate in some ways that the plaintiffs were ill-advised enough to stick to this most improbable story--which, I have already said, cannot be accepted--of a definite ceremony at Madras in November 1887 or thereabouts and so neglected to call evidence of what Nagir Bee's position was from 1887 onwards. The one person who was qualified above all others to give such evidence, the one person in the world who had the strongest interest for setting up a story of what took place, was Mahfil Nagir Bee her-self and she was not called. I cannot really accept the suggestion thrown out regarding her being unable to give evidence from illness. No Judge would have wished to try this case in the absence of the evidence of Mahfil Nagir Bee, if she and her side had only pressed for an adjournment. I am convinced that any Court would have adjourned the case to any reasonable extent to get that lady's evidence if she was suffering from sickness. There is nothing to show that any such application was made. In her absence, the appeal of the plaintiffs cannot succeed and the conclusion of the learned Judge must be upheld. The result is that this appeal is dismissed with costs.

Srinivasa Aiyangar, J.

12. I agree.