

(1937) 09 MAD CK 0054
In the Madras High Court

Rahiman Bibi Saheba, by agent Syed Yusuf Sahib	APPELLANT
Vs	
Mahboob Bibi Saheba and Others	RESPONDENT

Date of Decision : 01-09-1937

Acts Referred:

Citation : AIR 1938 Mad 141 : (1938) ILR (Mad) 278 : (1937) 46 LW 706 : (1937) 2 MLJ 753

Hon'ble Judges : Alfred Henry Ltonel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Ltonel Leach, C.J.—This appeal raises the question whether a child of a marriage contracted by a Muhammadan with his wife's sister, the wife being alive, is legitimate. It also raises questions with regard to the right of certain parties to payments on account of mahar.

2. The suit was filed by the appellant for the administration of the estate of her deceased father, Syed Mahmood Saheb, a Sunni Muhammadan, who died in Madras on the 17th July, 1930. There were ten defendants, a widow and the sons and daughters of the deceased. The first respondent is the widow. The appellant and the third respondent are the children of the deceased's first wife, who predeceased him. Respondents 2, 5, 6, 8 and 10 are the sons and daughters of the first respondent by the deceased. Respondents 4 and 9 are the children of the third wife, who also predeceased her husband. The seventh respondent is the son of the fifth wife, who survived the husband, but died before the suit was instituted. The first respondent was his fourth wife, and she and the fifth wife were sisters. It is contended by the appellant that the seventh respondent who is the son of the younger sister, is illegitimate, his mother having married the deceased while her sister was alive. It is said that the Muhammadan law prohibits a Muhammadan marrying his wife's sister and if he does take her as a wife her children have no share in the inheritance. The seventh defendant denies that he is illegitimate and, therefore, claims to be entitled to share in the estate of his deceased father. The learned trial Judge held that the marriage was

irregular, but that this did not affect the legitimacy of the seventh defendant. With regard to the matter of mahar, the claimants are the first and seventh respondents, the first respondent claiming in her own right and the seventh respondent as his mother's heir. The learned Judge held that they were each entitled to a sum of Rs. 585 by way of mahar. The appellant says that they are entitled to nothing.

3. The question: whether a Muhammadan may marry the wife's sister during the lifetime of his wife has been considered by the Calcutta High Court and by the Bombay High Court and they have arrived at different conclusions. The Calcutta case is that of *Aisunnissa Khatoon v. Karimunnissa Khatoon* I.L.R.(1895) 23 Cal. the Bombay case that of *Tajbi v. Motvla Khan* I.L.R.(1917) 41 Bom. 485. The Calcutta decision stands alone, but the Bombay decision has the support of all the principal modern works on Muhammadan law. The Calcutta High Court holds that a Muhammadan cannot lawfully marry his wife's sister, and that if he has marital relations with his sister-in-law during his wife's lifetime the children born of the union are illegitimate. This decision is largely based on a passage from the Koran. The Koran does prohibit a man marrying his wife's sister, as it prohibits a man marrying his wife's daughter. The Bombay High Court considers that Muhammadan law recognises a difference between a marriage which is void from the beginning and can never become lawful and a marriage with a person who may later become a lawful wife. In the case of a marriage with a wife's sister the marriage would become lawful on the divorce or death of the wife. This view finds acceptance in the *Fatwa-i-Alamgiri*, which is of undoubted authority. It dates from about the middle of the seventeenth century. Beaman, J., in *Tajbi v. Mowla Khan* ILR (1917) 41 Bom. 485 gives it the place in the Muhammadan law which the Institutes of Justinian occupy in Roman law and points out that it was written when Muhammadanism was at the height of its power in this country.

4. Modern text books, as I have indicated, are unanimous on the question. In the second edition of *Baillie's Digest*, the following passage appears at page 157 of part 1:

An invalid marriage has no legal effect before consummation; so that if a man should marry a woman by a contract which is invalid by reason of his having previously touched her mother with desire, and should then relinquish the wife, he might lawfully marry the mother. But after consummation it is joint to valid marriages as to its effects, one of which is the establishment of nusub or the child's paternity, as already mentioned.

5. The editor of the fifth edition of "*Wilson's Anglo-Muham-madan Law*" accepts the Bombay decision although Sir Roland Wilson himself favoured the contrary opinion. Ameer Ali states the position as follows (fourth edition, Vol. II, page 326):

This a man may not marry two sisters or a woman and her niece by the same contract or one after another whilst the previous marriage is subsisting. But if

such a marriage is contracted in fact, it is invalid (fasid) but not void (batil), for the prior marriage may become dissolved at any time by the death or divorce of one of them and thus validate the second union. Accordingly, although the Judge may separate the parties on the ground of the invalidity of the marriage, if it is consummated the issue would be affiliated to the father, in other words they would be his legitimate children.

6. This opinion is emphasised at page 391. In the tenth edition of Mulla (page 179) it is said that the bar of unlawful conjuncticm renders a marriage irregular, not void, and at page 180 there is express dissent from the Calcutta decision.

7. In view of this weight of authority we feel bound to accept the Bombay decision as being correct. While it is true that the Koran does prohibit a man marrying the sister of his wife during her lifetime, it is clear that this passage in the Koran has never been read as declaring the children of such a marriage to be illegitimate. In fact no writer on Muhammadan law has ever suggested that in the case of an invalid marriage, as opposed to a void marriage, the children are illegitimate. Of course where a Muhammadan marries a person contrary to law and it is not possible in any set of circumstances for that union to become regular the" issue would not be legitimate. The present case is one where the marriage was against the law when it was contracted but it was capable of becoming a valid marriage and therefore was valid so far as the seventh respondent is concerned. For these reasons we consider that the decision of the learned trial Judge on the question of legitimacy of the seventh respondent was correct.

8. With regard to the question of mahar the position is very unsatisfactory. It is impossible on the evidence to say whether anything is due. The seventh respondent in fact made no claim in his written statement to his mother's mahar; but he was allowed to raise the question in the course of argument. We consider that as this question of mahar was not dealt with adequately by the learned advocates in the Court below, it will be better to send the case back for further evidence on the question whether the first and seventh respondents are entitled to payments on account of mahar and on the question of the amounts. Accordingly the decree of the lower Court will, so far as it affects the matter of mahar, be set aside and the case remanded for re-trial on this question. Leave will be granted to the seventh defendant, to amend his written statement so as to make it quite clear that he is claiming to have paid out to him the money which he says was due to his mother on account of mahar. As the appeal has succeeded in part and has failed in part, we propose to make no order as to costs.