
(1951) 08 AP CK 0008
In the Andhra Pradesh High Court
Case No : Original Suit No. 19/1 of 1951

Shazada Qanum

APPELLANT

Vs

Fakher Jung and Others

RESPONDENT

Date of Decision : 30-08-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 4
Evidence Act, 1872 — Section 32(5)

Citation : AIR 1953 AP 6

Hon'ble Judges : Siadat Ali Khan, J

Bench : Single Bench

Advocate : Hyder Raza Zaidi, for the Appellant; Laxman Rao Ganu, for the Respondent

Final Decision : Dismissed

Judgement

Siadat Ali Khan, J.—This partition suit of the estate of Nawab Fakhrul Mulk filed by Safdarunnissa Begum and Ors. v. Nawab Ghazi Jung and Ors. (No. 116/56F.) has been compromised and a decree in terms of the compromise was passed some months ago, except in respect of the claim of Shazada Qanum, the alleged wife of Nawab Fakher Jung. In the compromise deeds the question of her status was expressly left open. She claims by petition dated 25-7-51 A.D. to be a wife by Muta of Nawab Fakher Jung but claims also that her Muta was of such a nature as to confer on her rights of inheritance as wife. In other words, she maintains that her Muta marriage was for an unspecified period, or alternatively, it was for life; and that such a Muta marriage creates rights of inheritance. All heirs of Nawab Fakher Jung except her own issue contest this and allege that her Muta marriage was temporary one; and, consequently, without any right of inheritance. I have reserved her share amounting to Rs. 11889-1-8 in case her status of a wife is established. In support of her contention she has adduced five witnesses and has herself gone into the witness box; in rebuttal two witnesses have been adduced and reliance has been placed on an application dated 10-11-1946 A.D. I have heard arguments of the learned advocates of the parties

and record my opinion below.

2. The learned Counsel for the Petitioner argued that P. W. 1 Muttahar Hussain has deposed that he attended the Muta ceremony, that the Muta was for an unspecified period & the dower Rs. 500; that P. W. 2 Husan Afruz Buwa has deposed that Nawab Fakher Jung had contracted a five year Muta with Ameera Qanum; that at the end of five years he let her go and said that his Muta with the Petitioner and two other Muta wives was for life but with Ameera Qanum was for five years and, therefore, he was releasing her. The learned Counsel argued that this statement of Nawab Fakher Jung is relevant u/s 32 (5) of the Indian Evidence Act as it is a statement relating to marriage and proves that the Muta with the Petitioner was for life. Referring to the deposition of the Petitioner the learned Counsel argued that she has also deposed that her Muta was for life, and besides her P.W. 4 Karimuddin also has deposed to the statement of Nawab Fakher Jung at the time of release of Ameera Qanum. The learned Counsel argued further that the application of the heirs to Nawab Fakher Jung filed in the Atiyat Court dated 10th Meher 1346 Fasli (Ex. A-I) though filed by the Defendants is entirely in his clients favour and proves everything which she has to prove; for, in that application the Defendants stated that among the legal heirs of Nawab Fakher Jung there were four widows of whom three were widows of Muta marriages and one a widow of a Nikah marriage; that this is a clear admission of the continuance of Muta for life; that besides the Defendants spoke of Ameera Qanum and her release after 5 years by the late Nawab and that this; indicates very clearly that the Muta with the other three wives was for life.

In reply the learned advocate for the Defendants argued that in the application referred to above the Defendants stated only that there were three wives by Muta marriage; that the Defendants do not deny even now that there were three Muta wives; that that does not imply any admission that they were wives by permanent marriages; that this application bears the signature of the Petitioner and that is an admission of her being a Muta wife only. He argued further that in this application maintenance for the widows was prayed on the ground of custom and not because of legal right, establishing quite clearly her admission that she has no legal right for maintenance as a wife.

The learned advocate pointed out further that Safdarunnissa Begum, sister of Nawab Fakher Jung, filed a suit for partition of the estate of her father, Nawab Fakhrul Mulk, in the Darul-Kaza Court; and in that suit the Petitioner was not made a party; that this shows that a near relative did not consider her an heir; that her daughter Zuhoorunnissa Begum objected to this and because of her objection she was made a party but even in the written statement filed by her after she was made a party she did not state that her Muta was for life; that similarly, even in the application dated 20th July 1051, which started this inquiry the Muta was not stated originally to be for life and that all this was significant and entirely refutes her claim. The learned Counsel argued emphatically that when the formula which was read was of a Muta marriage and the intention was

to contract a Muta marriage, it was impossible that a Nikah marriage could result; that when the Muta was for an unspecified period it must be deemed void, for in a Muta marriage specification of period is a condition precedent and that as it is not fulfilled, the marriage was void. The learned advocate argued further that in a Muta marriage no rights of inheritance accrue; and if it were intended that such rights should accrue there must be a contract to that effect entered at the time of Muta and not subsequently and here no such contract was either alleged or proved; that the Petitioner neither received any insurance money nor any pension on Fakher Jungs death and what is more, she admittedly never took any proceedings to get either the pension or the insurance money; that she has admitted in her deposition that she knew that the Nikah wife, Gouharunnissa Begum, filed a suit for her dower; that it was compromised in her favour and that in spite of this she never claimed or received any dower. The learned advocate concluded that all this indicates clearly that she has proved by her conduct itself that she was not a widow of any permanent marriage.

3. I have carefully considered the whole record and the arguments of the learned advocates of the parties. It appears to me that there is some confusion about a Muta for an unspecified period or a Muta for life. There is no difference between a Muta for an unspecified period and a Muta for life. The learned Counsel for the Petitioner has all along maintained that a Muta for an unspecified period is like a permanent marriage and it confers rights of inheritance on the contracting parties. The following quotation from Jawahar-UI-Kalam, a work of highest repute and of higher authority than Sharaye-ul-Islam, the most prevalent book among Indian Shias, will bear the learned Counsel out and will also show that there is no difference between a Muta for an unspecified period and a Muta for life:

By all the texts and the consensus of opinion it is necessary in a Muta marriage to specify the period for which it is contracted; if at the time of reading the marriage formula, the period is not specified either in words or in intention, it will not be a Muta contract, it will be a permanent contract. This is the most approved view among our Jurists and all are agreed upon this. You know that the word "Muta" applies equally to Nikah (permanent marriage) and Muta (temporary marriage) and that in Muta the specification of period is in addition; hence it is clear that if in Muta a specification of period is omitted, the contract becomes permanent on the following grounds that:

- (i) In principle contracts are usually valid, that is, as soon as the proper formula is spoken, a valid contract results;
- (ii) The contract will be deemed to be permanent because it is devoid of any period;
- (iii) Ibn Bukair has related in his book Muwasak that Imam Jafer-us-Sadek said "If a period, is specified it; is Muta and if the period is not stated it is Nikah" and
- (iv) When the conditions of a Muta were related to Abban, son of Taglab, he

stated that he feels shy at specifying the period of Muta; thereupon the Imam said: "This will be harmful to you" and he said "In what way the Imam replied. If you do not specify the period, the contract will become permanent. You will, be liable for maintenance for the period of Iddat and she will become your heir and you will not be able, to divorce her except according to Talak-us-Sunnat." In the books Masalik and Kashaf-ul-Lisam, the approved opinion is stated in this way that when the formula does not contain the specification of period, the contract is of a permanent marriage whether the intention was of a marriage for a specified period or not. It is because of this version of the approved opinion that the author of Masalik held that in a Muta where the intention was of marriage for a stated period but was not so expressed in the contract, the contract should be held void; for the words do not conform to intention, and it is necessary that both the words and the intention should be ad idem; and as here the words signify permanence and intention of a temporary marriage, the words and the intention are at variance and as such the contract should be deemed to be void.

In, support of the approved opinion stated above there is a tradition related by Samah. He states that he asked the Imam about a person who contracted a Muta marriage with a woman but forgot to specify the period; whether the marriage was unlawful and tantamounted to fornication and he replied "No. The marriage will be a permanent marriage and the person should ask for forgiveness of God for forgetting to specify the period. This is supported by another tradition of Hisham who states that he asked the Imam whether he can marry a woman ambiguously without stating the period and he replied it will be more harmful to him as it will be a permanent marriage and she will inherit him and he will not be able to divorce her unless during Tuhar (monthly menopause) and before two witnesses. Hisham relates that he asked How then should I marry her and the Imam replied by specifying the period. This tradition is quite clear and shows that in Muta specification of the period is necessary and only because of this specification of the period that it is taken out of the import and incidences of Nikah. The conclusion is clear that the commission to specify period does not affect the contract of marriage and it throws light upon this fact also that the intention of the man is not relevant, and if it is not expressed in words, it does not affect the validity of the marriage and does not invalidate the Muta.

In a case where a Muta is contracted but no period is specified, if we hold that the Muta is invalid, we fail to see that the intention of the marriage was present and the marriage should accordingly be deemed to be permanent; but it would be otherwise if we were to hold that in a permanent marriage, it is necessary that the intention of marrying permanently should be present and expressed; in that case such a marriage will be invalid for the intention of permanence is not expressed; but the Law giver has not prescribed that in a permanent marriage the intention of the permanent marriage should be expressed; the Law-giver has prescribed that by a marriage a permanent marriage is meant unless marriage for a specified period is intended in which case the period should be specified and hence when period is not, specified, permanent marriage is presumed.

Ibn Idris has stated that if a Muta marriage is contracted with the word "Muta" and the period is not specified, then it becomes void. But if Muta marriage is contracted with the words "Nikah" or "Tazvij" then, on non-specification of period the marriage becomes permanent. The reason according to him is that the words "Nikah" and "Tazvij" indicate a permanent marriage; and non-specification of period does not interfere with their import. On the other hand, Muta implies a temporary, marriage and non-specification of period invalidates it. You have seen above that the word "Muta" can be used for a permanent marriage which can be contracted by the use of the word "Muta" and, therefore, this distinction by Ibn Idris is invalid. Similarly, his other distinction, namely, the distinction between a case where the specification of period is left out intentionally and the case when it is omitted inadvertently because of forgetfulness or ignorance is invalid; he has held that if the specification of the period is left out intentionally, the contract of Muta will become a permanent contract of marriage; otherwise it will become void; for intentional omission of specification of period indicates an intention of contracting a permanent marriage as again the omission because of forgetfulness or ignorance, as in that case (here can be no intention of contracting any permanent marriage. This distinction is again invalid, for our position is that where there is an intention of contracting a Muta marriage but the specification of period is not made in the marriage formula, whether because of forgetfulness, ignorance, shyness or for any other reason whatsoever, as the intention is not expressed in words, mere intention is not relevant and it does not affect the validity of the marriage or invalidate the Muta. This approved opinion of our Imams has been strengthened by consensus of large bodies of the learned . Jurists who hold that if a period is not specified, the contract will become permanent and you have been explained the reasons at length. (1 Vol. 5, P. 138-139, Tehran, ed. of 1312 A.H. To the same effect commentary on Sharaye-ul-Islam p. 185, 1330 A.H. edition p. 237 of Lucknow edition, date not specified and Tanbihul Munkireen, p. 4 & 5 Delhi 20 p. 1267).

The above will show that in Shiahlav a permanent Nikah marriage for life can be contracted by the use of the word "Muta" also that specification of the period for which a Muta marriage is contracted alone makes a permanent marriage for life, a temporary Muta marriage for the period specified that where the AIR specification of period is omitted whether intentionally or inadvertently, a permanent Nikah marriage results with all the legal incidents of a Nikah marriage including the right of inheritance between the contracting parties. The question then becomes whether at the Muta marriage under consideration the specification of period was omitted; if so, the marriage will become a Nikah marriage and similarly, if the period specified was for life, a Nikah marriage will result.

4. Examining the evidence adduced by both the parties I find that really speaking only Muttahar Hussain and Shazada Qanum and Husan Afruz Buwa are the only three witnesses on behalf of the Petitioner who have deposed to her marriage being for an unspecified period or for life. As against them the two Defendants

witnesses, Sheik Dawood and Syed Ali Asghar Bilgrami, ex-Subedar and ex-Member, Revenue Board, speak of the Petitioner's Muta marriage being a temporary marriage for a period of three years with several renewals. Thus here is oath against oath and in such a case it is usual to judge the story of witnesses by certain tests, namely, how far it is consistent with itself; how it has stood the test of cross-examination; how far it (its in with the other circumstances of the case and is in consonance with the facts of human experience. Keeping these tests in mind, I find Muttahar Hussain's story of witnessing the Petitioner's marriage difficult to believe; for, though he admits that in a Muta marriage no witnesses are necessary among Shias, yet he states that he was made a witness. In Moslem. Law when a marriage is attested, it is always attested by two witnesses and keeping this rule in mind and his other admission that nothing was reduced to writing he was asked in cross-examination who the other witness was; but he felt annoyed and upset and replied that How could he know who the other witness was? Tin's is strange especially as he states that the whole assembly consisted of five to seven persons including the bride and the bridegroom and clearly he should have known who among them was the other witness if ho was himself present as a witness. Again the nizo of the marriage assembly indicates that it was a private affair and not a single member of the bridegroom's family attended it. It is. difficult to believe that to such a private celebration witnesses were called especially when Shia Law does not require any witness. His explanation that really speaking he was made a witness not to the Muta marriage but to the appointment as Vakil of the Moulvi who read the formula, is no explanation and is a distinction without difference; for when Shia Law requires no witnesses to the marriage itself, witness to the appointment of the Moulvi as Vakil or agent of the parties to read the marriage formula can hardly be deemed necessary (After discussing the evidence, the judgment proceeded): On all these grounds, I am of opinion that the evidence adduced on her behalf to prove that her Muta marriage was for an unspecified period or for life does not fit in with the other circumstances of the case and is, therefore, discredited. I, therefore, dismiss this suit. I, however, make no order as to costs in the circumstances of the case, especially as her maintenance is admittedly an obligation on the ground of custom at least on some of the Defendants themselves.