
(1921) 03 BOM CK 0010
In the Bombay High Court

Syed Habibur Rahman Chowdhury

APPELLANT

Vs

Syed Altaf Ali Chowdhury

RESPONDENT

Date of Decision : 09-03-1921

Acts Referred:

Citation : (1921) 23 BOMLR 636

Hon'ble Judges : Shaw, J;John Edge, J;Dunedin, J;Buckmaster, J;Ameer Ali, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Dunedin, J.—In this suit the plaintiff and appellant, Habibur Rahman Chowdhury, claims a declaration that he is the legitimate son of the late Nawab of Bogra, who died intestate on the 2nd July, 1915. The suit is opposed by the late Nawab's grandson, who is the son of a legitimate daughter, and by two nephews, the sons of an elder brother. The plaintiff is admittedly the natural son of the late Nawab, his mother having been a Jewess, Mozelle Cohen, who became a Mahomedan and cohabited with the Nawab. He was born in 1893. The Nawab had a daughter by the same lady in 1891. The Nawab's legitimate wife, the grandmother of the first defendant, died in 1890. The plaintiff based his claim on two grounds. He averred first that Mozelle was married to the Nawab. He further averred that on many occasions the Nawab had acknowledged him as his legitimate son. The defendants aver that no marriage ever took place. They also deny that any proper acknowledgment of legitimacy was made.

2. The case went to trial before Greaves J., and oral evidence was led and documentary evidence produced on both sides. Greaves J. held that no marriage was proved, but that, on the contrary, it was proved that Mozelle Cohen was no better than a prostitute and that no marriage ever did take place. He held that the Nawab did acknowledge the plaintiff as his legitimate son, but he held that in law, as the fact of no marriage was conclusively established, such acknowledgment would not confer the status of legitimacy. He, therefore, dismissed the suit.

3. Appeal was taken by the plaintiff. In the Court of Appeal the Chief Justice agreed with Greaves J. that the marriage was in fact disproved. Differing from Greaves J., he held that there was no proper acknowledgment of legitimacy, but, upon the assumption that there was, he agreed with Greaves J. on the law that such an acknowledgment, in the face of the disproof of the marriage, was of no avail.

4. Woodroffe J. thought that there was no acknowledgment of legitimacy and no affirmative proof of marriage, and therefore the plaintiff failed, but he did not go the length of holding that there had been disproof of marriage.

5. Chitty J. held that the marriage was disproved. That being so, he did not feel called upon to decide with certainty as to whether there was a good acknowledgment of legitimacy or not, though he indicated that the bias of his opinion was that there was not.

6. The plaintiff is thus faced by two adverse concurrent findings of fact to the effect that the existence of a marriage is disproved. As, however, the junior counsel for the plaintiff urged that this was not so, it is well to make it clear as to what constitute concurrent findings.

7. The first issue as settled by the trial Judge was, " Was Mozelle Cohen married to Sobhan" (the Nawab)? His finding as to this was:?

I hold that upon the evidence the long connection of Sobhan and Mozelle was inconsistent with the relation of husband and wife, and that Mozello is, upon the evidence, proved to be merely his concubine, and that Mozelle Cohen was not married to the deceased Nawab.

8. The Chief Justice said :?

I think the learned judge was right in holding that Mozalle was never married to the late Nawab Sobhan; to put it in other words, in my judgment it has been proved that Mozelle was never married to the late Nawab.

9. and Chitty J. said :?

I do not believe that any marriage between Abdus Sobhan and Mozelle Cohen ever took place; in other words, I find the marriage disproved.

10. These two learned judges form a majority of the Court of Appeal. That makes a concurrent finding, and it is not vitiated as such because, as here, the other judge in the Court of Appeal does not come to the same conclusion in fact though coming to the same result in law arising from another fact. Of course, to be concurrent findings binding on this Board, the fact or facts found must be such as are necessary for the foundation of the proposition in law to be subsequently applied to them.

11. The senior counsel for the appellants was unable to deny that there were concurrent findings as to the non-existence of the marriage. His argument was

directed to this, that, assuming he could show a good acknowledgment of legitimacy, that conferred the status of legitimacy and made it irrelevant to enter Lord Dunedin into any enquiry as to the fact of marriage.

12. The case might be disposed of by holding, as the majority of the learned judges of the Court of Appeal did, that there was no proper acknowledgment of legitimacy. There is not, however, as to this a "concurrent finding," for the learned trial judge thought otherwise, and it would be necessary to examine the evidence before coming to the above conclusion. Their Lordships do not think it necessary to embark on this enquiry. They will, without deciding, assume that there was a proper acknowledgment, for, as is to be presently explained, they are of opinion that such acknowledgment, in face of the fact that there was no marriage, is of no avail. Their Lordships consider that this result is reached on principle, and is concluded by authority.

13. Before discussing the subject, it is as well at once to lay down with precision the difference between legitimacy and legitimation. Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under the Mahomedan law. Examples of it may be found in other systems. The adoption of the Roman and the Hindu law effected legitimacy. The same was done under the Canon Law and the Scotch Law in respect of what is known as legitimation per subsequens matrimonium. By the Mahomedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of zina, that is, illicit connection, and cannot be legitimate. The term "wife" necessarily connotes marriage; but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledgment to accept the other not only as his son, but as his legitimate son. It must not be impossible upon the face of it, i.e. it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections Lord Dunedin occur, then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not juris et de sure, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position. The marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the

claimant establishes his acknowledgment the onus is on him to prove marriage. Once he establishes an acknowledgment, the onus is on those who deny marriage to negative it in fact.

14. A large number of cases were cited to their Lordships which they think it unnecessary to discuss in detail. It is quite true that in the earlier of the series not only is stress laid on the fact that an acknowledgment of legitimacy has more than a mere evidential value, but also there are expressions used such as that by a proper acknowledgment the status of legitimacy is "acquired." Fastening on such expressions, learned counsel for the appellants argued that to enter into an enquiry into the fact of marriage when a good acknowledgment had been made out was not only bad law but a sin against the rules of logic. The simple answer to this is that the phraseology of such expressions as cited above must not be pressed to disturb what is the ruling principle, and that principle is that in Mahomedan law such an acknowledgment is a declaration of legitimacy and not a legitimation. A declaration, though it cannot be withdrawn, may be contradicted, for it is only a statement: legitimation is an act, which being done cannot be undone. So the rules of logic remain untouched.

15. The whole question was thoroughly examined in a very learned judgment by Mahmood J. in the case of Muhammad Allahdad Khan v. Muhammad Ismail Khan I.L.R (1888) All 289; and finally, in the case of Sadik Husam Khan v. Haahim Ali Khan I.L.R (1888) All, 289; Lord Atkinson, delivering the judgment of the Board, said as follows (p. 234,) :?

It this be so, the rule of the Mahomedan law applicable to the case is well established: No statement made by one man that another (proved to be illegitimate) is his son can make other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible.

16. That statement is, in their Lordships view, clear and conclusive, and what they have said above is no more than an elaboration of what was there said.

17. Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.