

C.G. Amanulla Khan and Others Vs Anwar Khan

Court: Karnataka High Court

Date of Decision: Sept. 2, 2003

Acts Referred: Civil Procedure Code, 1908 (CPC) & Order 20 Rule 18

Citation: AIR 2004 Kar 22 : (2004) 1 KarLJ 142 : (2004) 1 KCCR 64 SN

Hon'ble Judges: V.G. Sabhahit, J

Bench: Single Bench

Advocate: Sriyuths Somnath Reddy and Ravindra Reddy, for the Appellant; Nalini Venkatesh, for Kesvy and Company, for the Respondent

Final Decision: Allowed

Judgement

V.G. Sabhahit, J.

This appeal by defendants in O.S. No. 92 of 1993 on the file of the Civil Judge (Senior Division), Chickmagalur, is directed against the judgment and decree dated 11-6-1998.

2. The essential facts of the case leading upto this appeal with reference to the rank of parties before the Trial Court are as follows.--

The plaintiff filed the suit, O.S. No. 92 of 1993 on 26-8-1993 for partition of the suit schedule properties by metes and bounds and to deliver his

2/11th share in the schedule properties and for a direction to enquire into mesne profits from the date of suit till the date of realization. The suit

schedule property comprises of 2 house properties situate in Chickmagalur. It is averred in the plaint that: the plaintiff and defendants are the

children of Gulame Ghouse Khan (hereinafter referred to as "G.G. Khan"), who was working as a driver; he died on 27-9-1964 at Chikmagalur;

G.G. Khan had married Smt. Khuthejabi of Kapu in South Canara District and out of the said wedlock of G.G. Khan and Smt. Khuthejabi, the

plaintiff was born; after the death of the mother of the plaintiff-Khuthejabi, G.G. Khan married Smt. Ayesha of Tumkur and she died within 15

days of the marriage; thereafter, G.G. Khan married Smt. Husanabi of Chickmagalur and out of the said wedlock, defendants 1 and 2 were born;

after the death of Smt. Husanabi, G.G. Khan married Smt. Fathimabi of Chickmagalur and out of the said wedlock, defendants 3 to 6 were born.

It is further averred that: G.G. Khan was the owner of the schedule properties; the plaintiff during the lifetime of his father had joined Government

service; the plaintiff was transferred from place to place and he took voluntary retirement from service on 30-6-1991; the plaintiff was under the

impression that katha in respect of the schedule properties continued to stand in the name of his late father, but, he learnt that defendants, filthily, by

creating some documents, got the katha changed to their name; however, possession of schedule properties continues with defendants; the plaintiff

has been in constructive possession of the joint family properties; after his retirement, though the plaintiff repeatedly asked defendants for partition

of the suit schedule properties and to deliver him his 2/11th share in the schedule properties, by metes and bounds, defendants went on

postponing; the plaintiff made an application to Masjid-A-Azam for partition of suit schedule properties and the Masjid authorities issued an

endorsement since defendants did not turn up before the Masjid-A-Azam and wherefore, the suit for the above said reliefs.

3. Defendants resisted the suit denying the averments made in the plaint that: G.G. Khan had married Smt. Khuthejabi and that the plaintiff was

born out of the wedlock between G.G. Khan and Smt. Khuthejabi and that G.G. Khan after the death of Smt. Khuthejabi, had married Ayesha

and after the death of Ayesha, married Smt. Husanabi and after her death married Smt. Fathimabi as averred in the plaint. It is averred in the

written statement that Smt. Husanabi was the first wife of G.G. Khan and defendants 1 and 2 were born out of the said wedlock. The marriage

between Husanabi and G.G. Khan was performed on 15-8-1942. Husanabi died on 6-1-1950 and after her death, G.G. Khan married Smt.

Fathimabi and out of the said wedlock, defendants 3 to 6 were born and Smt. Fathimabi died on 27-1-1983. The plaintiff is not the son of G.G.

Khan. It is further averred that: the second item of the suit schedule property had been given by G.G. Khan to his second wife Fathimabi in lieu of

Mahr by way of declaration dated 7-8-1964; subsequently, Smt. Fathimabi, by way of declaration dated 24-11-1982 has given the said item No.

2 of schedule properties to defendants 5 and 6 for meeting the expenses of their marriage; after the death of G.G. Khan, Smt. Husanabi and Smt.

Fathimabi, defendants have partitioned the properties detailed in the plaint schedule under a registered partition deed dated 15-7-1987 and they

have been in possession of their respective shares. The plaintiff was an orphan and the father of defendants, has as charity, helped the plaintiff by

giving education. Therefore, the father of defendants has specifically mentioned as guardian of the pupil at the time when the plaintiff was admitted

to the school by him and taking undue advantage of the said fact, the plaintiff has come up with the plea that the plaintiff is the son of late G.G.

Khan. Defendants are not aware whether the plaintiff was in service or has retired from service. It is also averred that the suit is barred by time and

proper Court fee is not paid. Therefore, the suit is liable to be dismissed.

4. On the basis of the above-pleadings, following issues were framed by the Trial Court.--

1. Whether the suit is properly valued and the Court fee paid is sufficient?

2. Whether the plaintiff proves that the deceased Gulame Ghouse Khan married Khuthejabi and the plaintiff is the son of this. Khuthejabi through

Gulame Ghouse Khan?

3. Whether the plaintiff proves that he is entitled for 2/11th share in the suit schedule property?

4. Whether the plaintiff proves that he is entitled for partition and possession of 2/11th share in the suit schedule properties?

5. Whether the plaintiff proves that he is entitled for mesne profits to be enquired from the date of suit?

6. Whether the defendants prove that item No. 2 of the suit schedule property was given by Gulame Ghouse Khan to his second wife Fathimabi in

lieu of Mahr?

7. Whether defendants prove that the suit is barred by time?

8. What order or decree?

On behalf of the plaintiff, the plaintiff was examined as P.W. 1 and Muthawalli of the Masjid-A-Azam has been examined as P.W. 2. The plaintiff

got marked documents, Exs. P. 1 to P. 12. On behalf of defendants, the G.P.A. Holder of defendants was examined as D.W. 1; Zainullabuddin,

the brother of Smt. Husanabi was examined as D.W. 2 and the Assistant Education Officer, Chickmagalur was examined as D.W. 2 and

documents, Exs. D. 1 to D. 9 were got marked. The learned Civil Judge after considering the contention of the learned Counsels appearing for the

parties and the oral and documentary evidence on record, by his judgment dated 11-6-1998, answered the said issues 1 to 5 in the affirmative;

issues 6 and 7 in the negative and issue 8 as per the final order and decreed the suit of the plaintiff with costs and held that the plaintiff is entitled to

partition and separate possession of 2/11th share in schedule house properties with mesne profits from the date of suit till the delivery of possession

of his share and further ordered that schedule house properties shall be partitioned as per the provisions of Indian Partition Act by a Commissioner

appointed by the Court and there shall be an enquiry regarding mesne profits under Order 20, Rule 18 of the Civil Procedure Code. Being

aggrieved by the said judgment and decree, defendants have preferred this appeal.

5. I have heard the learned Counsel appearing for appellants and the learned Counsel appearing for the respondent-plaintiff.

6. Learned Counsel appearing for appellants submitted that the finding of the learned Civil Judge that the plaintiff has proved that he is the son of

G.G. Khan and he was born to G.G. Khan, who had married Smt. Khuthejabi and that he is entitled to 2/11th share in the suit schedule properties

is perverse and arbitrary as the same is not based upon the relevant material. He submitted that even according to the plaintiff, there is no direct

evidence regarding marriage of G.G. Khan with Smt. Khuthejabi and the finding of the Trial Court that in view of the acknowledgment by G.G.

Khan, the paternity of the plaintiff is proved cannot be sustained. Learned Counsel has relied upon: the decision of the High Court of Judicature at

Madras in Fathima Bi Ammal v. A.A. Mahomed Mohideen and Ors., 1971(1) M. L.J. 451 decision of the Privy Council in Fatma Binti Hafidh v.

Administrator General, Zanzibar Protectorate", AIR 1949 PC 254 and decisions of the Hon"ble Supreme Court in Commissioner of Income Tax,

Andhra Pradesh Vs. Nawab Mir Barkat Ali Khan, and Income Tax Officer, Income Tax-cum-Wealth Tax Circle II, Hyderabad Vs. Nawab Mir

Barkat Ali Khan Bahadur, Hyderabad, and submitted that mere acknowledgment of the plaintiff as son of G.G. Khan, would not by itself prove

that G.G. Khan had acknowledged the plaintiff as his legitimate son as even according to defendants, the plaintiff was the fostered son of G.G.

Khan. In the school admission register, G.G. Khan is shown as a guardian and since son would also include foster son, he might have described as

such in the records that are produced by the plaintiff and there is no material to show that G.G. Khan had acknowledged the plaintiff as his

legitimate son and in the absence of any material in support of self-serving statement of P.W. 1, the Trial Court was not justified in holding that the

plaintiff had proved that he is the son of G.G. Khan and Smt. Khuthejabi.

7. On the other hand, the learned Counsel appearing for the respondent-plaintiff submitted that since the plaintiff did not have any direct evidence

regarding marriage of G.G. Khan with Smt. Khuthejabi, he has produced indirect evidence and in Mahomedan Law, acknowledgment is

recognized as one of the indirect modes of establishing paternity. Learned Counsel submitted that the material on record including the sale deed,

Ex. P. 5, dated 16-10-1952, description of the plaintiff in the School Leaving Certificate, Ex. P. 6, would clearly show that G.G. Khan and

acknowledged the plaintiff as his son and there is no material on record to show that the plaintiff was born out of the Zena or adulterous life of

G.G. Khan as alleged by defendants. Therefore, in view of the settled principles of Mahomedan Law, the plaintiff has proved, as rightly held by the

Trial Court, that he is the son of G.G. Khan and G.G. Khan had married Smt. Khuthejabi and wherefore, the plaintiff is entitled to 2/11th share

under the Mahomedan Law in respect of the suit schedule properties, which admittedly, are the properties of G.G. Khan.

8. Having regard to the contentions urged by the learned Counsels appearing for parties, points that arise for determination in this appeal are.--

1. Whether the Trial Court was justified in holding that the plaintiff has proved that the deceased Gulame Ghouse Khan married Smt. Khuthejabi

and the plaintiff is the son of Smt. Khuthejabi through Gulame Ghouse Khan?

2. Whether the Trial Court was justified in holding that the plaintiff is entitled to 2/11th share in the suit schedule properties?

3. Whether the Trial Court was justified in decreeing the suit of the plaintiff?

4. Whether the judgment and decree passed by the Trial Court, calls for interference in this appeal?

5. What order?

I answer the above points for determination as follows.---

Point No. 1 : In the negative

Point No. 2 : In the negative

Point No. 3 : In the negative

Point No. 4 : In the affirmative.

Point No. 5 : As per the final order for the following.--

REASONS

9. Points 1 to 4.--These points are considered together since they are interconnected and to avoid repetition.

10. I have gone through the oral and documentary evidence adduced by the parties and the judgment and decree passed by the Trial Court. The

plaintiff, who is examined as P.W. 1 has reiterated the averments made in the plaint in evidence that: G.G. Khan married Smt. Khuthejabi of Kapu

of Dakshina Kannada District and she was the first wife of his father and he was born out of the said wedlock between G.G. Khan and

Khuthejabi; his mother died during his childhood and thereafter, his father married Smt. Ayesha of Tumkur; Smt. Ayesha died within 15 days of

her marriage with his father; thereafter, his father married Smt. Husanabi of Chickmagalur and defendants 1 and 2 were born out of the said

wedlock; after Husanabi's death, his father, married Fathimabi and defendants 3 to 6 were born out of the said wedlock between G.G. Khan and

Smt. Fathimabi. P.W. 1 has further stated that: the suit schedule properties are the properties of his father, G.G. Khan; he joined Government

service in the year 1970; he worked in Revenue Department and retired in June 1991 from Taluk Office, Tarikere; he took voluntary retirement on

account of weakness of his eyes; his father was looking after the suit property during his lifetime; after the death of his father, the defendant 3-

Usman Khan started looking after of the suit properties; on account of his service outside Chickmagalur, he was unable to look after the suit

schedule properties; it is not correct to say that he was not son of G.G. Khan; it is false to state that his mother Smt. Khuthejabi is not the wife of

G.G. Khan and has produced extracts of suit properties, as per Exs. P. 1 to P. 3. According to P. W. 1, katha of the suit properties stood in the

name of his father till his death and after the death of his father, the name of the 4th wife of his father Fathimabi was entered. He has produced his

service register by taking out summons to the Department as per Ex. P. 4 and has further stated that: during his lifetime, his father purchased 2

acres 20 guntas tari land in his name and that he was a minor aged 13 years at the time of the said purchase and has produced Ex. P. 5 and

S.S.L.C. Marks Card, which contains the date of birth as per Ex. P. 6; he (P.W. 1) married Kairunnisa at Chickmagalur in Masjid-A-Azam on 9-

8-1964 and he has produced extract of the marriage register as per Ex. P. 7. P.W. 1 has also produced the endorsement issued by KGID, as per

Ex. P. 8. Ex. P. 9 is the endorsement issued by Masjid-A-Azam stating that defendants did not turn up on the notice issued on the basis of the

complaint filed by the plaintiff before Masjid-A-Azam. It is elicited in the cross-examination of P.W. 1 that: he has no document to show that his

mother-Smt. Khuthejabi was married to G.G. Khan; he does not know as to when the where G.G. Khan and Smt. Khuthejabi married; G.G.

Khan's brother's wife Ashabi told him that his mother Khuthejabi was married to G.G. Khan and at that time, he was aged about 7-8 years; it is

not correct to say that G.G. Khan had not married Khuthejabi; Ayeshabi also told him that after the death of his mother Khuthejabi, Gulame

Ghouse Khan married Ayeshabi of Tumkur; he did not know as to how many days after the death of his mother G.G. Khan married Ayeshabi; he

has no document to show that G.G. Khan married Ayeshabi; he does not exactly remember the death of his mother and he is not aware if he was a

child of 2-3 days old at the time of death of his mother. It is further elicited in his cross-examination that it is not correct to say that in 1942, G.G.

Khan was not married; it is not correct to say that Husanabi of Chickmagalur was the 1st wife of G.G. Khan; Nikha register is a permanent

document maintained by the Masjid; all marriages are recorded in the said register; it is true that if his mother Khuthejabi had married G.G. Khan

at Kapu, Dakshina Kannada District, the said marriage ought to be entered in the Nikha register of the Masjid at Kapu and so also the marriage of

Ayeshabi with G.G. Khan should find place in the Nikha register of the Masjid at Tumkur. It is also elicited that it is true that the number of

marriages that is taken by the male is recorded at the time of recording of the marriage in the Nikha register and he does not know if the number of

marriages of the female partner is also recorded in the Nikha register. He has denied the suggestion that as he was an orphan and G.G. Khan

looked after him as a fostered son and has stated that G.G. Khan admitted him to the school. It is further elicited that there was a proceeding

before the Land Tribunal in respect of the land purchased under Ex. P. 5. He has given statement before the Land Tribunal and he has not stated

that his brothers and sisters have also share in the said property and the Land Tribunal granted occupancy right in favour of the tenant and he has

received the compensation amount deposited by the tenant. He has denied the suggestion regarding the declaration made by G.G. Khan on 7-8-

1964 in connection with Mahr in favour of Fathimabi, He has also denied the suggestion that he is not the son of G.G. Khan and that he has filed a

false suit to make unlawful gain.

11. P.W. 2 is the Muthawalli of Masjid-A-Azam at Tumkur. He has been examined to produce Ex. P. 10, the Nikha register regarding marriage

of the plaintiff. P.W. 2 has produced Ex. P. 10 and the relevant entry has been got marked as Ex. P. 10(a). It is further stated in his evidence that

on 8-5-1983, the plaintiff-Anwar Khan had made a complaint before the Masjid and a notice was issued to the concerned persons-defendants

and since they did not turn up, an endorsement was issued as per Ex. P. 11. It is elicited in his cross-examination that number of marriages

undergone by the bride and bridegroom is entered in the Nikha register and there is separate column for the same in the Nikha register. It is further

elicited that he does not remember as to who gave the information regarding the name of the father of the plaintiff while making an entry in the

Nikha register at the time of the marriage of the plaintiff and he knew G.G. Khan. But, he does not know as to whether G.G. Khan was the father

of the plaintiff.

12. On behalf of defendants, the General Power of Attorney holder of defendants has been examined as D.W. 1 and he has produced General

Power of Attorney as per Ex. D. 1. D.W. 1 has reiterated the averments made in the written statement and has produced Exs. D. 1 to D. 8 and

has further stated that Husanabi was the first wife of G.G. Khan and defendants 1 and 2 were born out of the said wedlock. After the death of

Husanabi, G.G. Khan married Fathimabi and had four children-defendants 3 to 6 out of the said wedlock, He has denied that G.G. Khan had

married Khuthejabi. It is elicited in his cross-examination that he do not know as to for how many years, G.G. Khan fostered and brought up the

plaintiff. He had not attended the marriage of Amanulla Khan and he does not know whether the marriage of Amanulla Khan was performed in the

Masjid. It is also elicited that he has no personal knowledge as to in which school, the plaintiff has studied. It is also elicited that he is related to

defendants and he is a resident of Bangalore since 15 years before the date of his deposition (witness examined on 25-9-1996).

13. D.W. 2 is the brother of Husanabi. He was aged 85 years when he was examined on commission. He has stated in his evidence that his sister

Husanabi had been married to G.G. Khan, who was also called as Nawab. The plaintiff is not the son of G.G. Khan. His sister Husanabi did not

have issues for 14 years after the marriage and that time, his brother Mahamad Sab alias Amir Sab handed over the plaintiff to his sister and he

was fostered by G.G. Khan and his sister. Marriage between G.G. Khan and Husanabi was their first marriage. D.W. 2 has stated that he does

not know as to whether G.G. Khan had married earlier. However, he has further stated that G.G. Khan had not married earlier to his marriage

with Husanabi. Husanabi and G.G. Khan brought up and educated the plaintiff. He is the fostered son and was not born to G.G. Khan. After the

plaintiff was taken for fostering by Husanabi and G.G. Khan, Husanabi had two children and after the second child was born, Husanabi died.

Thereafter, G.G. Khan married Fathimabi. It is elicited in his cross-examination that he is related to defendants as his daughter is married to the 1st

defendant and he does not know where the plaintiff was born and as to who are his natural father and mother. G.G. Khan was working as a Driver

with A.M. Basavegowda. He does not know about the educational qualification of the plaintiff. He has denied the suggestion that he is deposing

falsehood to help the 1st defendant, who is his son-in-law.

14. D.W. 3 is the Assistant Education Officer. He has been examined to produce the admission register, Ex. D. 9 and he has produced Ex. D. 9

and has stated that as per the relevant entry, Anwar Khan, the plaintiff was admitted on 26-8-1943 at Sl. No. 6 to Thippanahalli Primary School

and name of G.G. Khan is shown as the guardian. The relevant entry has been got marked as Ex. D. 9(1a). It is elicited in his cross-examination

that admission form will be with the relevant school and the transfer certificate is issued whenever the pupil changes the school.

15. The above said oral and documentary evidence on record has to be considered in the light of the principles of Mahomedan Law regarding the

proof of paternity. It has been observed by the learned Author, Mulla in his book Principles of Mahomedan Law in the Chapter, Parentage -

Legitimacy and Acknowledgment that: parentage is the relationship of parents to their children; paternity is the legal relation between father and

child; according to Mahomedan Law, the paternity of a child can only be established by marriage between its parents and marriage may be

established by direct proof and if there be no direct proof, it may be established by indirect proof, that is, by presumption drawn from certain facts.

It may be presumed from prolonged cohabitation combined with other circumstances, or from an acknowledgment of legitimacy in favour of a child

and one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. It is further observed as follows.--

(1) Where the paternity of a child, that is, his legitimate descent from his father cannot be proved by establishing a marriage between his parents at

the time for his conception or birth, the Mahomedan Law recognizes "acknowledgment" as a method whereby such marriage and legitimate

descent can be established as a matter of substantive law for purposes of inheritance.

The Mahomedan Law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of

the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an

incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being disproved. The

doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the

acknowledged child is not proved in the sense of the law as distinguished from disproved. In other words ""the doctrine applies only to cases of

uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful

union between the parents of the acknowledged child"". In short, the doctrine applies only to cases where either the fact or the exact time of the

alleged marriage is a matter of uncertainty, that is, neither proved nor disproved. Stated in another form, the doctrine is ""limited"" to cases of

uncertainty of legitimate descent, and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of

such acknowledgment"".

It is further observed that an acknowledgment need not be express. It may be presumed from the fact that one person has habitually and openly

treated another as his child, that is, as a legitimate child. Conditions of valid acknowledgment have been stated as follows.--

344. Conditions of valid acknowledgment--In order to render an acknowledgment valid and effective the following conditions must be fulfilled.--

(1) ""the acknowledgment must be not merely of sonship, but must be made in such a way that it shows that an acknowledger meant to accept the

other not only as his son, but as his legitimate son;

(2) the ages of the parties must be such as to admit of the acknowledger being the father of the person acknowledged;

(3) the person acknowledged must not be the offspring of Zina, that is adultery, incest or fornication, as he would be if his mother could not

possibly have been the lawful wife of the acknowledger at any time when he could have been begotten, as where the mother was at that time the

wife of another man or had been divorced by the acknowledger and the legal bar to remarriage had not been removed or was within prohibited

degrees of the acknowledger. If the marriage is disproved, the issue would be the issue of fornication;

(4) the person acknowledged must not be known to be the child of another man;

(5) the acknowledgment must not have been repudiated by the person acknowledged"".

Regarding acknowledgment and burden of proof, it is observed as follows.--

Acknowledgment and burden of proof.--As marriage among Mahomedans may be constituted without any ceremonial, direct proof of marriage is

not always available. Where direct proof is not available, 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 of legitimate sonship. Further, it must

not be impossible upon the fact of it as stated in the present section. If the conditions stated in the section are satisfied, the acknowledgment has

more than a mere evidentiary 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, presumption of fact, and not juris et de jure, 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 a marriage. Once he establishes an acknowledgment the onus is on those who deny a marriage to negative it in fact"".

Acknowledgment is sufficient to establish a valid marriage unless the contrary appears. Provided that no obstacle should exist as for example the

woman is the wife of another. If marriage be in dispute, it has to be established first before acknowledgment of paternity of the child is possible. If

marriage was not possible at all mere can be no acknowledgment"".

16. In the case of Fathima Bi Ammal, supra, the High Court of Judicature at Madras, has observed as follows.--

7. Issues 1 to 3.--The main question for consideration in this case is about the paternity of the plaintiff. The paternity of a child is its relation to its

parents which can be established only by the marriage between its parents. The marriage may be valid or irregular, but not void. In Mahomedan

Law, marriage is a contract having its object the procreation and legalisation of children. Marriage may be established by direct evidence. If direct

proof is not possible, it may be established by indirect proof, that is, by presumptions drawn from certain facts. Marriage may be presumed from

prolonged cohabitation combined with circumstances or from an acknowledgment of legitimacy in favour of a child. The Privy Council in *Habibur*

Rahman v. Actaf Ali, AIR 1922 PC 159 observed:

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".

The mere admission of paternity in no way establishes anything but a casual union and more is required to show the existence of a marriage bond if

the existence of that bond is to be derived from association alone without any preceding ceremony. The father may accept his parenthood without

intending to make the child legitimate. Once, however, marriage is established, an acknowledgment of paternity is enough to hold the marriage to

be valid. Though acknowledgment of paternity is substantive evidence, it does not raise an irrebuttable presumption. The acknowledgment merely

proceeds upon the hypothesis of a lawful union between the parents. But, where in a case like this, the union, to start with, was illicit, strong

evidence is required to show that the acknowledgment was made with the intention of conferring legitimacy".

In the case of *Fatma Binti Hafidh*, supra, Privy Council has observed as follows.--

(9) It is true that in cases where the question to be determined is whether there has been a marriage between the parents, something more than a

mere acknowledgment of paternity is required. This principle is clearly stated in the headnote to the judgment of the Board delivered by Lord

Macnaghten in *Abdool Razack v. Aga Mahomed Jaffer Bindaneem*, 21 I.A. 56: 21 Cal. 666 in the words:

The Mahomedan doctrine of legitimacy by acknowledgment does not apply to every case of admission of paternity; an intention to confer the

status of legitimacy must be found or presumed".

On the other hand, where no marriage is shown to exist or where the concubine is not a slave concubine, the mere admission of paternity is not

enough for the purpose of affording proof of legitimacy; the treatment must be such as to convey the fact that the child is acknowledged not merely

as the offspring of the father but as his legitimate offspring. In default of such an acknowledgment the father may merely wish to admit that the child

is his but not that it is legitimate or that he intends to make it so"".

17. The above said oral and documentary evidence on record in the present case has to be considered to find out as to whether the Trial Court

was justified in holding that the plaintiff has proved that he is the son of G.G. Khan and Khuthejabi and that the same has been proved by

acknowledgment, which is recognized as principle under the Mahomedan Law for establishing parentage. It is clear from the evidence of P.W. 1

that he has clearly admitted in his cross-examination that he does not know as to when and where G.G. Khan married Khuthejabi and he has no

document to show that G.G. Khan had married Khuthejabi. In the instant case, the fact that G.G. Khan had married Khuthejabi and the plaintiff is

the son born out of the said wedlock is sought to be proved on the basis of the acknowledgment referred to above, which is recognized in

Mahomedan Law. It is well-settled in view of the above principles that mere acknowledgment of the plaintiff as son by G.G. Khan, would not by

itself enable the plaintiff for a presumption that he is born out of marriage of G.G. Khan with Khuthejabi, the mother of the plaintiff. The essential

condition for proving the acknowledgment as referred to above is acknowledgment that the plaintiff is the legitimate son of G.G. Khan. It is clear

from the defence taken by defendants as also the facts spoken to by witnesses, D.Ws. 1 and 2 that even according to them, the plaintiff lost his

mother when he was one or two days old and the brother of D.W. 2 brought and gave the plaintiff to D.W. 2's sister Husanabi and Husanabi and

G.G. Khan fostered the plaintiff and brought him up as their fostered son and the plaintiff was educated in a School by G.G. Khan. Documents that

are produced by the plaintiff comprises of Exs. P. 1 to P. 3, assessment list of the suit schedule properties, which show that the properties were

standing in the name of G.G. Khan. Ex. P. 4 is the service register, wherein name of the father of the plaintiff was described as G.G. Khan. It is

well-settled that entries in the service register are made on the basis of the information given by the employee at the time of his joining service and

that would not in any way help and plaintiff to show that G.G. Khan had acknowledged him as his son as the said entries are not based on the

statement given by G.G. Khan, but, on the basis of the information given by the plaintiff at the time of his joining service. Ex. P. 5 is the certified

copy of the sale deed. In the said sale deed, the plaintiff is described as ""Gulame Ghouse Khan Sabhara Makkalu"". The said sale deed is dated

16-10-1952 and the material on record shows that the property purchased in the said sale deed was the subject-matter of the claim made by the

tenant before the Land Tribunal. As per the evidence of P.W. 1, the Land Tribunal has conferred occupancy rights in favour of the tenant and in his

statement before the Land Tribunal, P.W. 1 has not stated that his brothers and sisters have also got share in the said property. The entire

compensation deposited by the tenant has been taken by the plaintiff as admitted in his evidence as P.W. 1. Ex. P. 6 is the S.S.L.C. marks card,

wherein the name of the father of the plaintiff is shown as G.G. Khan. It is clear from Ex. P. 6 that there is no separate column to show the name of

the father or the guardian. On the other hand, the admission register Ex. D. 9 produced by D.W. 3 would show that in the said register, the name

of G.G. Khan is shown as the guardian of the plaintiff and in respect of other entries in the same register, name of the father of the pupil has been

shown. Ex. P. 7 is the marriage register extract in respect of the plaintiff. Ex. P. 8 is the letter issued by the insurance office, which is issued as per

the particulars in the service register. Ex. P. 9, the endorsement issued by Masjid-A-Azam, Chickmagalur, would only prove that the plaintiff had

given a complaint to the Masjid-A-Azam and since defendants did not turn up, the matter could not be settled by the Masjid-A-Azam. Ex. P. 10,

is the extract of the marriage register regarding the marriage of the plaintiff. Ex. P. 11 is a letter dated 5-10-1993 written by A.M. Basavegowda to

the Masjid-A-Azam, where in said Basavegowda, under whom G.G. Khan was working as a Driver, has informed the Masjid-A-Azam that the

plaintiff-C.G. Anwar Khan is the first son of G.G. Khan and he himself educated the plaintiff upto S.S.L.C., and got him a job in the Government

during the lifetime of G.G. Khan and also got a land purchased in the name of the plaintiff in 1952 and that the plaintiff has not been given any share

in the properties belonging to G.G. Khan. The said letter was produced by P.W. 2 and nothing has been elicited in the cross-examination of P.W.

2 to disbelieve his evidence that Ex. P. 11 had been written by Basavegowda to Masjid-A-Azam of Chickmagalur. The said letter would only

show that Basavaraj had written to the Masjid-A-Azam that the plaintiff is the eldest son of G.G. Khan and he (Basavegowda) had educated the

plaintiff upto S.S.L.C., and that he had got him employment in the Government and the plaintiff was not given any share in the properties belonging

to G.G. Khan. The said Basavegowda has not been examined before the Court and contents of Ex. P. 11 can be proved only by examining

Basavegowda and mere fact that P.W. 2 has produced a letter would only prove that the said letter written by Basavegowda as per Ex. P. 11 was

received by Masjid-A-Azam of Chickmagalur. Even otherwise, contents of Ex. P. 11 would not show that G.G. Khan had married Khuthejabi

and that the plaintiff was born out of the said wedlock as there is no reference to the said fact in the letter, Even assuming that the said letter has

been proved, contents would not be helpful to the plaintiff to prove that G.G. Khan had married Khuthejabi and that the plaintiff was born out of

the said wedlock. Further, evidence of defendants referred to above would clearly show that Fathimabi was the second wife of G.G. Khan. P.W.

2 has clearly admitted in his cross-examination that there is entry in the Nikha register regarding the number of marriages undergone by the bride

and bridegroom and the same are at Column Nos. 1 and 2. Ex. D. 4, extract of the Nikha register would show that G.G. Khan had married for the

second time and in respect of Fathimabi, it was her first marriage and this would clearly belie the contention of the plaintiff that Fathimabi is the 4th

wife of his father G.G. Khan. Further, the evidence of defendants would clearly show that the plaintiff was only a fostered son of G.G. Khan. D.W.

2 has been examined on commission and he was aged 85 years at the time of his examination on commission. D.W. 2 has clearly stated that his

brother Mahamed Sab alias Amir Sab had handed over the plaintiff to Husanabi. The plaintiff was brought up and fostered by Husanabi and G.G.

Khan. Nothing has been elicited in this cross-examination to disbelieve his evidence that the plaintiff was the fostered son of Husanabi and G.G.

Khan. The Trial Court has proceeded on the basis that since the name of the plaintiff is described as the son of G.G. Khan in the Secondary

School Leaving Certificate-Ex. P. 6 as also the sale deed Ex. P. 5 and in the letter written by Basavegowda to Masjid-A-Azam, Chickmagalur, as

per Ex. P. 11, the plaintiff has proved that G.G. Khan acknowledged him as his son. It is no doubt true that the above said material on record

would show that G.G. Khan had acknowledged the plaintiff as his son and it is also the case of defendants that the plaintiff was brought up as the

fostered son of G.G. Khan. Apart from the evidence of P.W. 1 and the documentary evidence referred to above, there is no material whatever

produced by the plaintiff to show that G.G. Khan acknowledged the plaintiff as his legitimate son. It is well-settled that mere fact that the plaintiff

was described as son of G.G. Khan in the sale deed Ex. P. 5 as referred to above, would not necessarily lead to presumption that he was

acknowledged as the legitimate son by G.G. Khan and when the material on record clearly shows that he was fostered and brought up by G.G.

Khan as fostered son and G.G. Khan was described as guardian in the admission register produced by D.W. 3 as per Ex. D. 9, it is clear that the

above said material on record would probalize the version of defendants that the plaintiff was the fostered son of Husanabi and G.G. Khan and the

Trial Court failed to note that in view of the principles laid down in the above said decisions, it is clear that only where the conditions of valid

acknowledgment are proved and where it is shown that G.G. Khan had acknowledged the plaintiff as his legitimate son, he would be entitled to

declaration that he is the son of G.G. Khan as the same would give rise to the presumption of marriage between G.G. Khan and Khuthejabi. The

above said oral and documentary evidence on record clearly shows that the plaintiff has failed to prove that G.G. Khan had married Khuthejabi

and he is the son of G.G. Khan and Khuthejabi. Therefore, the finding arrived at by the Trial Court cannot be sustained as the material on record

has not been appreciated in the right perspective as laid down in the decisions referred to above and also having regard to the fact that there is no

proof of acknowledgment of the fact that G.G. Khan had acknowledgment of the fact that G.G. Khan had acknowledged the plaintiff as his

legitimate son and the material on record clearly probalizes the fact that the plaintiff is the fostered son of G.G. Khan and he was brought up by

G.G. Khan and Husanabi. Accordingly, I answer the above said points for determination. In view of my finding on Point 1, it is clear that the

plaintiff would not be entitled to any share in the suit schedule properties and the judgment and decree passed by the Trial Court decreeing the suit

of the plaintiff cannot be sustained and the suit filed by the plaintiff is liable to be dismissed and accordingly, pass the following order.--

This appeal is allowed, the judgment and decree passed by the Civil Judge (Senior Division), Chickmagalur, in O.S. No. 92 of 1993, dated 11-6-

1998 decreeing the suit of the plaintiff is set aside and the suit of the plaintiff is dismissed. However, having regard to the facts of the case, parties

are directed to bear their respective costs in this appeal.