

(1873) 03 PRI CK 0002

Privy Council

Case No: None

Newab Mulka Jehan
Sahiba and Others

APPELLANT

Vs

Mahomed Ushkurree
Khan and another

RESPONDENT

Date of Decision: March 20, 1873

Citation: (1873) 1 IndApp 192

Hon'ble Judges: James W. Colville, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

Montague E. Smith, J.

1. This was a suit brought by the Appellants in the Civil Court of the Judge of Lucknow under Section 15 of Act VIII, 1859, to obtain a declaration of their right to inherit the property of Sooltan Ara Begum deceased.

2. The Appellants are members of the Royal Ramily of Oudh; Newab Mulka Jehan is the grandmother, and the other Appellants are the half brothers and sisters of Sooltan Ara Begum; her father was the late Humayoon Bukht, son of Mahomed Ally Shah, late King of Oudh, and Newab Mulka Jehan; and her mother is the Respondent, Pearee Khanum.

3. The Respondent Ushkurree Khan, claiming to be the husband of Sooltan Ara Begum, and her mother Pearee Khanum opposed the Appellants' claim. The Civil Judge dismissed the suit, and his judgment has been affirmed by the officiating Judicial Commissioner.

4. The questions are, first, whether the marriage of Ara Begum with the first Respondent was perfect at her death so as to confer a right on him, as her husband, to inherit; and second, whether her mother, Pearee Khanum, is entitled to a share of her property.

5. The ceremony of a marriage between Ara Begum and Vshkurree Khan was performed on the 16th of October, 1859, in the Fazolee (translated, nominal) form. Both were then

minors, and were so treated; there is evidence that she was eight years and some months old; he about nine. Ara Begum's father was then dead, and the marriage was contracted by Mulka Jehan, her grandmother. It was celebrated with great pomp in the presence of the grandmother and the relatives of the girl. Pearee Khanum (the mother) says, "I was associated in the marriage; I was not directly consulted, but I was quite agreeable." Soon after the marriage Mulka Jehan took Ara Begum to Arabia to visit the holy places, and the girl died there without, as far as it appears, having met or communicated with her husband since the marriage. There is a discrepancy in the evidence as to her age when she died; the Appellants asserting she was eleven years of age only, her mother that she was thirteen. It seems probable, from the evidence, that she was nearer the former age than the latter; but it is not material, since according to the evidence of the High Priests in the absence of evidence to the contrary the presumption of the Mahomedan law is that a girl attains puberty when she reaches the age of nine years. In this case then, it may be taken, there being no evidence to the contrary, that Ara Begum had attained the age of puberty before her death; but there is no evidence that, after attaining it, the subject of the marriage was ever presented to her, or that she expressed in any way assent to or dissent from it.

6. The first question arising on these facts is, whether the marriage was inchoate only and in suspense, until ratified by the assent of the girl on her reaching the age of puberty, or whether it was complete and valid, unless dissented from and rejected by her on her attaining that age; and upon the decision of it, the rights of the parties depend. If the latter be the law, as the girl died without any expression of dissent, the marriage cannot now be avoided, whereas if the former be the true doctrine, the marriage, unless ratified (which will be hereafter discussed) remains imperfect, and can confer no rights. The determination of the question must be governed by Mahomedan law and the doctrines of the Sheeah sect, to which the Royal Family of Oudh and the husband's family belonged.

7. Authorities were cited to shew that the two great Mahomedan sects differ on the point upon which the case hinges. It is said that the Soonnees hold marriages like the present to be voidable only, i.e., complete unless avoided by dissent; the Sheeahs, on the other hand, that they are Fazolee only, and incomplete until ratified by assent. And there certainly seems to be ground for the opinion that this distinction exists, and that the latter is the doctrine of the Sheeahs.

8. The evidence of the High Priests of Lucknow, given in the suit, appears to be clear upon the point, and upon the rights of the parties in cases like the present. They declare the law to be that the marriage of a minor contracted by the father or grandfather is binding and irrevocable, they having the legal right to contract for the minor; but that this irrevocable power of contract does not belong to guardians of a lower degree, as the mother or grandmother, who can only contract a Pazolee marriage, that is, one incomplete for want of sufficient authority. They declare that, according to the Sheeah doctrine, a Fazolee marriage requires the assent of the minor, after attaining puberty and mature understanding, to perfect it, and that, in the event of death intervening before such

assent is given, the marriage remains incomplete.

9. It was proved that, in accordance with the law thus laid down, the ceremony of the marriage in this case was in the Fazolee form.

10. In Wilson's Glossary the word "Fazuli" is thus denned : "In Mahomedan law, an unaccredited agent, one who acts for another without authority, and whose transactions are invalid unless confirmed by the principal." The word appears also from the Glossary to be used as an adjective, to denote contracts requiring such confirmation.

11. Their Lordships see no reason to disparage the learning or fairness of the High Priests who were examined upon the law, and they have observed with regret the strong animadversions made by the officiating Judicial Commissioner upon their evidence, which, in so far as it states the law, appears to be in accordance with the written authorities.

12. Part II. of Mr. Baillie's Digest of Mahomedan Law (as stated by the author in the introduction), is intended to exhibit the doctrines of the Sheeah sect, and to be composed entirely of translations from the Sharaya-ool-Islam, a work, he says, of the highest authority in that Section

13. The following are extracts from chap. i. Section 2, p. 9:

The contract of marriage may, according to the most approved doctrine, remain in suspense, as already mentioned, for the sanction of the person having authority in the matter; and if a young girl is contracted in marriage by any other person than her father or paternal grandfather, whether the person be nearly or remotely related to her, the contract cannot pass or be operative, unless subsequently allowed or approved by herself, even though the person were her brother or paternal uncle. In the case of a virgin this permission or assent may be inferred from her silence when the matter is propounded to her; but a woman who is not a virgin must be put to the trouble of giving expression by actual speech to her permission or assent.

14. Ibid., p. 10. "When the fathers of two young children have contracted them to each other in marriage, the contract is binding on them both; and if one of them should happen to die, the other, would be entitled to share in the deceased's inheritance. If any other than the fathers of the children should contract them in marriage, and one of them should happen to die before arriving at puberty, the contract would be void, and both dower and the right of inheritance would fail."

15. Another passage states the law still more distinctly : chap iv. p. 294. "When a girl under puberty has been married by her father or paternal grandfather, her husband inherits from her, and she from him. So also, if two young children are married to each other by their fathers or paternal grandfathers, they have mutual rights of inheritance. But if they should be contracted in marriage by any other than their fathers or paternal

grandfathers, the contract remains in suspense till assented to by the spouses themselves, after arriving at puberty and discretion; and if one of them should die before such assent has been given, the contract would be void, and there would be no right of inheritance. And the same would be the result though one of them should attain to puberty and assent to the marriage, if the other should die before puberty."

16. The extracts cited in the judgments below from the works of Macnaghten and Baillie relate, as their Lordships understand, to the doctrine of the Soonnees. These, and still more distinctly some passages in the Hedaya, certainly seem to indicate that by that Law, a marriage between minors of the kind now in question requires dissent to annul it; and that in the event of one of the minors dying, the marriage remains in force, and the incidents of inheritance and of dower attach, as upon a marriage between persons of full age : Hedaya, book ii. chap. ii. vol. i. pp. 102 - 6.

17. It is not, however, necessary to decide what would be the rights of the parties according to the Soonnee Law; but their Lordships are led, by the evidence of the High Priests and the authorities above cited, to the conclusion that, by the law of the Sheeah school, the present marriage, unless the assent of the girl after attaining puberty can be shewn, was imperfect, and could, if she died before such assent, create no rights or obligations.

18. It must, therefore, be ascertained whether such assent has been shewn, or ought to be presumed.

19. It seems to be clear, according to the Sheeah doctrine, that the girl must have arrived at puberty, and also be of mature understanding when her assent is given. There is no evidence of the state of Ara Begum's understanding, but assuming her to have been by age and understanding capable of assenting, their Lordships think there is not sufficient evidence of the fact of her assent to satisfy the requirement of the law.

20. The law of the Soonnees appears to adopt a very stringent rule requiring the option of dissent to be declared by the girl as soon as puberty is developed. But the doctrine of the Sheeahs seems to be that the matter ought to be propounded to her, so that she may advisedly give or withhold her assent. This is a rational provision of law, for assent ought to be the expression of the mind and will of the girl upon the marriage when it is brought to her notice, and is present to her understanding.

21. It appears by the extracts from Baillie, Part II., before cited, that the girl's assent, if a virgin, may be inferred from her silence when the matter is propounded to her; but a woman who is not must be put to the trouble of giving expression by actual speech to her assent. The mention of this distinction (which involves a concession to the modesty of a virgin) strongly indicates the view of the Sheeah school that assent must be evidenced in such a way as to leave no doubt that it is the act of the mind and will. Their Lordships, however, do not mean to hold that it must, in all cases, be shewn that the question of the

marriage was distinctly propounded to the girl. They have no doubt that assent may, in some cases, be presumed from the conduct and demeanour of the parties after they have attained puberty and mature understanding. Circumstances may obviously exist which would properly lead to the inference that the marriage had been recognised and ratified, although no distinct assent could be proved. But in this case there is neither evidence of express assent nor of facts from which it may be presumed. The girl was taken to Arabia, far from her betrothed husband, and there is proof that the marriage was ever brought to her attention, or that she by word or conduct in any way recognised or ratified it.

22. An attempt was made to prove a usage in the royal and noble families of Oudh that a girl married as a minor could not reject the marriage, although her guardians, who had assented to it, might be of a lower degree than her father or grandfather; but the evidence entirely failed to prove a usage having the force of law. The utmost that the Mahomedan gentlemen who were examined proved was, that it would be unusual and unbecoming for a girl to reject such a marriage. But the question is not what Sooltan Ara Begum would have done, as a matter of propriety, if she had lived, and the question had been propounded to her, but what by law she had the power to do, if she chose to exercise it. All these witnesses acknowledged that they must be governed by the law as expounded by the High Priests; and their evidence almost involved the assumption that the girl would have had a right by law to disaffirm the marriage, but that it would be unbecoming in her to avail herself of it.

23. For these reasons their Lordships, guided by what they conceive to be the doctrine of the Sheeah school, are of opinion that the evidence fails to shew that the Fazolee marriage had become perfect before Ara Begum's death, and consequently that the claim of Ushkurree Khan to inherit as her husband has not been established.

24. The Judges below rested their judgments principally upon passages cited from Macnaghten and Baillie, relating to Soonnee doctrines, and relied on these authorities in preference to that of the High Priests of the Sheeah school. This reliance, and their assumption that the Appellants had contended that the marriage was illegal, explain the grounds of their decision. But their Lordships do not understand that the Appellants so contended, or that the High Priests so declared the law. The marriage was perfectly legal as far as it went, but did not become effectual from the want of the necessary ratification.

25. It now becomes necessary to consider the claim made by Pearee Khanum as the mother of Ara Begum. It appears that she at first filed a petition in the suit, disclaiming any right in herself, and confessing the Appellants to be the heirs of her daughter, but she afterwards withdrew it, asserting in another petition that the disclaimer had been wrongfully obtained from her, whilst living in Mulka Jehan's house, and that she was entitled to inherit a share of her daughter's property.

26. Their Lordships agree with the Judicial Commissioner that she ought to be allowed to withdraw her first petition. The Civil Judge, after deciding in favour of the validity of the

marriage, dismissed (to use his words) "the suit to cancel the marriage," and referred Pearee Khanum to a separate suit to prove her rights. The Judicial Commissioner, in his judgment dismissing the appeal, stated that in his opinion the objection to the mother's claim arising from her being a slave could not prevail, as her slavery ceased on the annexation of Oudh by the British Government, and that any transfer of her legal rights of inheritance ought, by the Mahomedan law, to be made by gift or sale.

27. The Appellants appear to be the only parties interested in disputing the mother's claim. They have in fact brought this suit for the purpose of having their rights declared against her, as well as against the alleged husband; and it was their duty to have brought forward a complete case in support of the declaration of right they sought to obtain in their own favour, especially as the suit was directed to impeach two decisions of the Chief Commissioner, by which he had ordered a Waseekah pension of Rs. 32. 11a. 8p. per mensem, granted to Ara Begum, to be paid to her and the husband. The Appellant, Mulka Jehan, had applied to reverse these orders, but the Commissioner refused to reconsider them, adding, that she might apply to the Civil Courts for a declaratory judgment. His words are : - "As to the two points she raises, 1st, as to the legality or otherwise of Ushkurree Khan's title; and, 2nd, as to the legality or otherwise of Pearee Khanum's title, she (Mulka Jehan) may prove her case in the Civil Courts; and should she obtain a declaratory judgment, she may apply for a reversal of former orders."

28. The objection made to the title of the mother to inherit is, that she was a slave of Mulka Jehan, when her daughter Ara Begum was begotten. Now, although this is asserted, there really is no evidence whatever of it in the record; and therefore the status of slavery which, it was contended, would by the Mahomedan law exclude her from inheriting, has not been in fact established.

29. It is not directly proved, and the circumstances rather repel than support the presumption, that this disqualifying status existed. It is admitted, on all hands, that Ara Begum was not treated as " the spurious offspring of Mirza Humayoon Bukht, but as his lawful daughter, and as such entitled to inherit a share of his property.

30. This treatment of the daughter by the Appellants affords a strong presumption in favour of the right of her mother to inherit from her.

31. It appears to be clear Mahomedan law that, if a man has a child by his own slave, the child, without marriage, is deemed to be lawfully begotten, and is entitled to inherit as a co-sharer with children born in marriage - the mother in such case becoming oom-i-walad, and entitled to emancipation on the death of her master. These consequences however, according to some authorities, occur only in the case of a master having a child by his own slave, for it is said to be unlawful for a man to have connection with the slave of another, especially with his mother's slave, and that the parentage of a child born of such connection, although begotten in error, cannot be established to belong to him. (See Macnaghten's Precedents, Case VII., p. 322; Hedaya, vol. i. p. 384, vol. ii.,

32. It should be observed that the authorities just cited are of the Soonnee school, and that there is some authority for the proposition that among the Sheeahs a child begotten of a slave-girl, of whom the true owner had parted with the usufruct to the father of the child, stands on the same footing as the child of a man by his own slave. (See Baillie's *Imameea*, pp. 53, 56.) But, however this may be, the Appellants have wholly failed to prove the status of Pearee Khanum, or that if she was the slave of Mulku Jehan, that the latter gave her over, for a time, to the embraces of her son. All that is proved with certainty is, that Ara Begum was treated as the legitimate child and one of the co-heirs of her father, and that Pearee Khanum is her mother, and therefore presumably entitled to inherit to her. The disinclination of the Mahomedan law to bastardize children has sanctioned the presumption from slight evidence of marriage or lawful consort. (See Macnaghten, *Preliminary Remarks*, pp. 23, 24, cited with approval by this tribunal in *Khajah Hidayut Oollah v. Rai Jan Khanum* 3 Moore's Ind. Ap. Ca. 316. There is no doubt an absence of direct evidence in the present suit to support the presumption, but the admission of the legitimacy of the daughter by the Appellants, to be implied from their conduct, is amply sufficient, after the deaths of the child and her father, for the purpose, and stands in the place of proof against them. It is to be observed that there would be no insurmountable obstacle to such a presumption in this case, even if it had been proved that Pearee Khanum had been the slave of Mulka Jehan, for her mistress might have emancipated her for the purpose of making the relations between her son and the girl lawful. It is clear that Mulka Jehan, as the grandmother of Ara Begum, has in the strongest way recognised her as a legitimate child of her son. She was so brought up in the family, and the ceremony of her marriage with Humayoon Buhht was performed with much pomp and ceremony. After these acknowledgements, Mulka Jehan and the Appellants who act with her ought, in their Lordships' view, to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence they think the presumption must prevail.

33. The conclusion at which their Lordships have arrived makes it unnecessary to consider what would be the effect of the British Acts relating to slavery upon the capacity of Pearee Khanum to inherit from her daughter, if it had been proved that she was a slave at the time of her daughter's birth.

34. The result of their Lordships' opinion is that Mulka Jehan as grandmother is not entitled to inherit, and that Pearee Khanum is entitled, as the surviving parent, to a third share of her daughter's property (see Baillie's *Imameea*, book 7, Clause 1, Sections 3, 4, pp. 272, 273; *Punjaub Code*, Section 4, Clauses 8, 9; Macnaghten, ch. 1, Section 4, Clause 62), and the Appellants, the half brothers and sisters of the deceased, to the residue.

35. Their Lordships think that as between the Appellants and the first Respondent, they should each pay their own costs in the Courts below.

36. Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and that of the Civil Judge; and, in lieu thereof, to order that it be declared that the marriage of Sooltan Ara Begum with the first Respondent was imperfect and invalid, "- and that he is not entitled, as her husband, to a share of her estate, and that the Respondent Pearee Khanum, as mother of Ara Begum, is entitled to one-third share, and that the Appellants, other than Mulka Jehan, are entitled, so far as relates to any claims by the Respondents (but without prejudice to any other claims) to the residue, and further to order that Pearee Khartum is entitled to her costs in the Courts below from the Appellants that the Appellants and the first Respondent should each pay their own costs in those Courts, and that any costs which may have been paid by the Appellants to the first Respondent be refunded by him.

37. There will be no order as to the costs of this appeal.