

(1935) 07 CAL CK 0026

Calcutta High Court

Case No: None

Joga Bibi and Another

APPELLANT

Vs

Mesel Shaikh

RESPONDENT

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**Date of Decision:** July 10, 1935**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 109, 491, 494

**Citation:** 164 Ind. Cas. 957**Hon'ble Judges:** Lort-Williams, J; Jack, J**Bench:** Division Bench

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### Judgement

Lort-Williams, J.

In this case, a Rule was issued to. show cause why the convictions and sentences passed upon the petitioners should not be set aside. They were charged under Sections 491 and 494 read with 109 of the Indian Penal Code. Jogu Bibi, the girl was charged with bigamy and Bhola Biswas, the man to whom it was alleged she was nika married, was charged with aiding and abetting.

2. The evidence was that Jogu Bibi was legally married to the complainant Mesel Shaikh in Jaistha, 1331 B.S. and from that date they lived as husband and wife for about 9 or 10 years. The. nika marriage was not denied.

3. The sole question, therefore, was whether the marriage of Jogu Bibi to Mesel Shaikh was proved according to law. The first question turns upon the age of the girl at the time of the marriage to Mesel Shaikh. It seems clear from the evidence that she was a minor at the time, that her father was dead and that her mother was the legal guardian.

4. Both the Magistrate and the Sessions Judge came to the conclusion that the marriage had been legally proved and that it had been consummated and that Jogu Bibi had continued to live with Mesel after she had attained puberty and, therefore,

had ratified the marriage. This ratification would cure any lack of consent on the part of the legal guardian. But it could not cure a marriage which was not valid ab initio.

5. The evidence shows that the alleged marriage was conducted on the verandah of Nekjan Bibi's bari, the girl Jogu Bibi being in an inner room. On the verandah were present the Molla on behalf of the bridegroom, a Ukil on behalf of the bride and also a number of male witnesses. The complainant said that the marriage took place at Nekjan's bari; that one Jubbar Khondkar officiated as Molla, who also officiated at the nika marriage between the accused, that Poran and Osman were witnesses to his marriage, that Innus Mondal was the Ukil, and that Nekjan and Jogu Bibi gave *ejen* which the Magistrate translated as meaning "consent". This evidence was corroborated by a number of witnesses, who also said that there was a writing about the marriage, but that it was not registered. It was not signed by the complainant, nor did he put his thumb mark on it. One witness stated that Osman signed it on behalf of the bridegroom's party. That document was not forthcoming at the trial, One witness denied that there was any *kabinnama* or any other writing about the marriage, nor was there any payment by the complainant to the bride's party. This was denied by the complainant who asserted that the payment was made and ornaments given.

6. Now, the first point to consider is, what is the meaning of the word "*ejen*" which the Magistrate translated as "consent". It seems to us obvious that by this "*ejen*" or "consent" is meant the authority given by the bride or her mother to some one to act on her behalf. It is not necessary that any one should act on behalf of the bride or her legal guardian; but either the bride, or her legal guardian if she be a minor, or somebody on her behalf must enter into the marriage contract. Usually, this is done by appointing a Molla and a Ukil to act for the bridegroom and the bride. In such circumstances, Ukil must be authorised by the bride or, if she be a minor, by her legal guardian to act for her.

7. Now, the legal essentials for a Muham madan marriage are very simple. As stated in Mulla's Muhammadan Law, 10th Edition, at page 175, the only essentials for a valid marriage are:

that there should be proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who, must be sane and adult Muhammadans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential.

8. There can be no doubt, I think, that the word *ejen* appears as *azin* in some dictionaries and in others as *izn* all meaning permission or "consent" that is to say,

they indicate the authority which must be given to some agent to act on behalf of the principal in contracting the marriage. It will be noticed from the description, which I have given of the evidence, that none of the Witnesses spoke to any proposal having been made at the meeting or any acceptance of such proposal having been given on behalf of the bride. It is possible that if the witnesses had been aware of the legal essentials of a Muhammadan marriage, they might have been able to say whether, in fact, a proposal was made and an acceptance given at this meeting on the verandah. But as the evidence stands on the record, there is no evidence of any contract at; all. In such circumstances it is clear that a valid marriage has not been legally proved to have taken place.

9. The result is that there can be no conviction in this case. The convictions and sentences must, accordingly, be set aside and the fines, if paid, must be refunded.

10. The accused petitioner No. 2, who is on bail, will be discharged from his bail bond.

11. The Rule is made absolute.

Jack, J.

12. I agree.