
(1870) 05 CAL CK 0008

Calcutta High Court

Case No: None

In Re: Khatija Bibi

Vs

APPELLANT

RESPONDENT

Date of Decision: May 25, 1870

Judgement

Norman, J.

Mr. Kennedy and Mr. Evans contended that the return must be taken as conclusive as to the facts therein stated. I certainly feel great hesitation in assenting to that proposition. The question is one which has been much debated, and in England doubts on the subject have been set at rest in cases like the present by a Statute, 56 George III, c. 100, which does not apply to this country. When the return sets out an adjudication by a Court of competent authority it is well settled that parties will not be allowed to controvert facts directly decided by such authority. That is the ground taken In the matter of Clarke 2 Q.B., 419. But the judgments of Lord Denman, C.J., and Patteson, Williams, and Wightman, JJ., In re Carus Wilson 7 QB 1008-1112, to say nothing of other cases, appear to me to show that in other respects the return does not preclude enquiry into the truth of matters alleged therein. I should hesitate long before pronouncing that I could be precluded by anything in the return in this case from seeing Khatija Bibi with my own eyes, if I thought it necessary, causing such an enquiry to be made as to her age and condition as would enable me to determine whether or not Khatija is now legally in the custody of Assa Bibi. An enquiry of a character similar to that which was directed by the Court of King's Bench in the case of the Hottentot Venus 13 East, 195, a native of South Africa brought from thence and exhibited in London, as it was supposed against her own consent, or such an enquiry as that by which Mr. Justice PhEAR satisfied himself that there was no reason to doubt the truth of the return in the Queen v. Vaughan In the matter of Ganes Sundari Debi 5 B.L.R., O. Cr. 418.

2. But Jewa Sallay has not attempted to deny the material statements in the return. He has not stated either in the affidavit on which the rule nisi was granted, or elsewhere that Khatija has attained, or that he believes that she has attained, the age of puberty, and

therefore I must take the statement in the return to that effect as true.

3. I proceed to consider what is the position of the respective parties.

4. According to Mahomedan law the effect of the contract of marriage is to place the wife under the dominion of the husband, but, notwithstanding marriage, the right to the care and custody of a girl belongs not to the husband but to her mother until she attains the age of puberty. In fact, it is said, that when a wife is too young for matrimonial intercourse, she has no right of maintenance from her husband whether she be living in his house or not.

5. In the affidavit, as well as in the return, Assa Bibi states that the marriage has not been consummated, and that Khatija Bibi was not of the age of puberty at the time of the marriage. Jewa Sallay in his affidavit states that Ismael Assanji informed him that Khatija at the time of the marriage was of the age of twelve years and six months or thereabouts. And Abou Baeker states her age to be now thirteen. Nothing can be more unsatisfactory than the statement in the return as to the age of Khatija Bibi--that "she is an infant under the age of sixteen years, to wit, of the age of eleven years or thereabouts." Assa Bibi, the mother, must well know the true age of her daughter. This statement as to the age of Khatija in the return would, if the meaning of the words "to wit," "videlicet," was explained by the interpreter, be probably understood by Assa Bibi as binding her to nothing.

6. If the statement said to have been made by the father to Jewa Sallay is true, even if Khatija had not attained puberty at the time of her marriage, she would in all probability do so in a very few months. I rely on the opinion of Dr. Chevers in his Medical Jurisprudence for Bengal and the North-Western Provinces. If the girl has arrived at the age of puberty, the mother is no longer entitled to the custody of her.

7. It is clear that Jewa Sallay thinks he has grounds for being dissatisfied that Khatija should remain in the custody of her mother. It appears from the mother's own affidavit that he has charged her with carrying off Khatija for the purpose of giving her up to prostitution. He does not renew that charge in the affidavit sworn in this matter. Assa Bibi says that this charge was false and malicious. It may be false, but it is easy to understand that Jewa Sallay might very readily impute evil intentions to Assa Bibi. That Assa Bibi should have carried off his wife from Bundari to Calcutta secretly, without giving him an opportunity of claiming possession of her, would seem to have been a clear breach of good faith towards him and of the trust, on which, according to Assa Bibi's own statement, he had allowed his wife to remain with her. In Baillie's Mahomedan Law, page 125, it is said, "A man having contracted his virgin but adult daughter in marriage is desirous of removing with her and his family to another town; he may do so even though objected to by the husband when the dower has not been paid; but if the dower has been paid, she cannot be removed without her husband's consent." The effect of this is that if the time has come when the husband is entitled to possession of his wife, she cannot without his consent be removed by her parents to a distant place.

8. Here, however, it appears by the return that the wife is not an adult, and that the dower has not been paid.

9. According to the statement of Assa Bibi in her affidavit she has always resided at Calcutta, and I think I may assume in the absence of anything to lead to a contrary inference that she was or may have been married there.

10. If so, it is probably the case that had she gone from Bundari openly, she should have had a right to take her daughter to Calcutta and keep her there until she attained the age at which her husband could claim her. In Baillie's Mahomedan Law, page 435, there is some discussion as to the place of "hizanut" where young children may be kept. Jewa Sallay has not attempted to raise the question whether Assa Bibi has a right to the custody of Khatija in Calcutta, by confessing the facts set out in the return and seeking to avoid the effects of them by stating circumstances to show that Calcutta is not a place to which Assa Bibi had a right to remove her daughter. He does not allege that Calcutta was not the home or place of residence of Ismael Assanji or Assa Bibi at the time of the marriage.

11. Mr. Woodroffe referred to a passage in Baillie's Mahomedan Law, page 54, where it is said, "When a husband has paid down the dower and calls upon a Judge to order his wife to be delivered up to him, and her father declares that she is too young, and unfit for a man and unable to bear his embraces, while the husband maintains that she is quite fit and able, then, if she is a person who usually goes abroad, the Judge is to compel her appearance before him, and to determine for himself as to her competency; but if not, he should direct a woman in whom he can confide to inspect her and should order her to be delivered, or not to be delivered to her husband according as they may report her to be competent or incompetent." He contended that Khatija being now before the Court, the Court might direct an enquiry and order Khatija to be delivered to her husband if she should appear to have attained the age of puberty. But it appears to me, that if the husband seeks to have his wife delivered over to him, he has a remedy by a suit for that purpose. The only question upon the return to the writ of habeas corpus is whether the custody is legal. I am of opinion that on the materials before me, I must assume that Khatija Bibi has not attained the age of puberty; secondly, that the dower has not been paid or tendered; thirdly, that there is nothing to show that Calcutta is not a place in which her mother is entitled to keep her until the time shall come when her husband will have a right to demand to have her delivered up to him. The conclusion is that she must be taken to be legally and properly in the custody of her mother, and I therefore order that she be taken back to the place from whence she has been brought.

¹See Queen v. Vaughan; in the matter of S.M. Ganesh Sundari Debi, ante, p. 418.