

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Jariut-ool-Butool v. Mussumat Hosseinee Begum, from the late Court of Sudder Dewanny Adawlut for the North-Western Provinces of India; delivered 25th February, 1867.*

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Present :

SIR WILLIAM ERLE.

SIR JAMES W. COLVILE.

SIR EDWARD VAUGHAN WILLIAMS.

SIR RICHARD T. KINDERSLEY.

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SIR LAWRENCE PEEL.

THIS is an Appeal from a decision of the Sudder Dewanny Adawlut of the North-western Provinces of India, which affirmed a decision of the Local Court of Jounpore in favour of the Respondent, the Plaintiff in the suit. The Plaintiff sought to recover certain moveable and immoveable property specified in her plaint "by right of inheritance to Mirza Abdoolla Beg, her uncle and ancestor, and also to Mirza Jumud Beg, her husband." The plaint contained a detailed description of the property sought to be recovered. The principal Defendants were Mussumat Hossein Buksh, Mussumat Ruzzee-ool-Nissa, alias Rugbee Khanum, and Mussumat Uzeez-ool-Nissa, alias Mussumat Emamun.

The first and second named female Defendants claimed each to be a widow of the deceased Abdoolla, but each denied that the other was ever married to Abdoolla, each alleging the other to have been his mistress and not his wife. The third female Defendant claimed to be the legitimate daughter of Abdoolla by his alleged wife, her mother, the second female Defendant. The first female Defendant, the

present Appellant, also set up a will alleged to have been made in her favour by Abdoolla the day before his death, by which he bequeathed to her by the description of "my married wife Mussumat Jareutool Batool, alias Bebee Hossein Buksh," all his moveable and immoveable property, subject to certain provisions in favour of the Plaintiff, to which it is not necessary to allude further. The validity of this will was disputed both by the Plaintiff and by the second and third Defendants. The Civil Court decided against the will, and also against both the alleged marriages, and the alleged title of the third female Defendant. On appeal to the Sudder Dewanny Adawlut the decision was affirmed. The first female Defendant alone has appealed to Her Majesty from the decision of the Sudder Dewanny Adawlut. The second and third Defendants have not appealed, and therefore their interests are put out of the case entirely.

In the case of *Naragunty Lutchmeedavamah v. Vengama Naidoo* (9 Moore's Indian Appeals, page 87), their Lordships said, "It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence, or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion, it must be shown very clearly that they were in error, in order to induce us to alter their judgment."

Their Lordships, after a very careful attention to the evidence, and to the arguments addressed to them on the part of the Appellants, are of opinion that there is wanting in this case that clear indication of error in finding against the marriage, and the will, which would be necessary to take this Appeal out of the operation of the above salutary rule.

The Sudder Court thought the evidence as to the marriage of the Appellant insufficient. The same Court concurred with the Court below in thinking the evidence in support of the will untrustworthy. They say, "We concur with the Judge in discrediting the evidence in support of the will. We consider the attendant circumstances as altogether improbable and unworthy of belief."

Is error clearly manifest in these conclusions? Is the evidence clearly sufficient to prove either issue? The claim to be declared the wife of the deceased would establish, on oral testimony, a heavy charge on the estate of a deceased person to the amount of 50,000 rupees, and the will is one made *in articulo mortis*. Some of their Lordships can judge by their experience of precedent cases before this Committee, of the dangers likely to ensue if the Courts of Justice in India did not require cogent proof in such cases.

If it were once conceded that a woman once a concubine could be converted by judicial presumptions into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption arise? The ordinary legal presumption is, that things remain in their original state. Were, then, the Courts below well founded in treating the original connexion by the Appellant with the deceased Abdoolla as an illicit connexion? The evidence was conflicting. She herself admits that she was once a prostitute. It is true that she alleges penitence and a change of life, and some of her witnesses say that she had relinquished the life of a prostitute before her intercourse with Abdoolla began; and one witness says that she had discontinued it five years before she came to live with Abdoolla. But no evidence is adduced to prove what was her intermediate employment, or what were her means of maintaining herself in the interim. She declares the deceased to have been a man entertaining one mistress whilst his wife was living. The Court had to determine amidst conflicting evidence, whether it was more likely that he should make a woman of that class his wife, and settle on her a very large dower, or that he should induce her to live with him as his mistress, displacing the former favourite? The evidence was conflicting, and the finding cannot be viewed as a decision against the weight of evidence. If, then, the Courts below were justified in finding that the original connexion was illicit, where is the evidence of any change in its character? If length of time be invoked as a reason for considering the previous connexion as lawful, the Appellant herself is found placing no reliance on mere

length of intercourse with respect to the second Defendant's claim to be regarded as a wife : and if the subsequent removal to a different house of that lady be insisted on as an argument that she was not a wife, the answer seems to be that the mere removal into and maintenance in a separate house is not at all inconsistent with the status of a regularly married wife, superseded either by wife or concubine, but undivorced. The Appellant, indeed, is not content to rely on any presumption from length of time ; she alleges and calls witnesses to prove an actual marriage ceremony, accompanied with some degree of publicity, the presence of witnesses, and the oral assignment of a large sum of dower.

The witness Imam Buksh (No. 19), the physician, deposes in page 57 of the record to this effect, that only one year before the death of Abdoolla, the latter assured him that the Appellant was his wife ; that the witness asked the question in consequence of the Appellant referring him to the deceased for information on the point, asserting that she was a wife, and that the second Defendant was not, and that the Mirza would so inform him. Now this witness describes himself as having attended both on the Mirza and on the Appellant, not as a mere stranger in the house. But what origin can reasonably be ascribed to this inquiry as to her status, unless some ambiguity existed in relation to it ; and how is this ambiguity consistent with a marriage celebrated from the first before witnesses, with an outspoken assignment of a large dower in the husband's house ? Can any ignorance or uncertainty about such a status exist at all in the house of the husband with such an introduction of a new wife, and such an open celebration of a marriage ? The evidence, therefore, does not cohere, and the Court might well distrust it ; nor could their distrust be reasonably found fault with in a case where each alleged wife brought forward the same kind of evidence of an open celebration, and each treated as undeserving of credit the allegations and evidence of the other.

With respect to the will, the improbabilities against it are strong, and the evidence in its favour weak. It is deposed that the second female Defendant was present during the time that the will was being dictated, rough copied and clean copied ; that a pro-

vision was made in the will for her expenses in case she proceeded on a pilgrimage to Mecca, and that this was done on her request. She is therefore described as cognizant of the will, and assenting to it in some degree by accepting a contingent benefit under it. Yet she was united with her daughter and son-in-law in interest, and throughout acted in conjunction with them. She claimed to be a wife, and sought to establish her daughter as an heir. Her assent to the will is therefore most improbable, and the supposition is rendered more so by this, viz., that at this very time her son-in-law Usghur was making a public protest by way of petition addressed to a public officer, claiming his interference and presence at the house of Abdoolla, to prevent a will being executed in the name, as he alleges, of Abdoolla, then a senseless and dying man. Is the second alleged wife to be supposed acting at variance with herself without adequate motive, and in so short a period of time to return to opposition? It appears that she had two years before protested against a description of herself as "prostitute" on a public assessment, and had been described as wife on her own application on more than one public document. She was therefore claiming to be a wife. The reason for describing her as present and acquiescent at the time of the preparation of the will is obvious. That a Mahometan of high position and wealthy, a man of business besides, should, with a view to prevent disputes in his family, make such a will, as likely to foment as to quell them, and omit to make that disposition which would, had her story been true, secure to the Appellant her dowry of 50,000 rupees and her share as widow, is not a probable occurrence in itself. One would expect him to act with the advice and aid of his usual mookteah, and not defer the settlement of disputes in the confused state of his family connections until his last hours, and then to put himself in the hands of people not previously employed by him; on the other hand, if a will, whether from fraudulent or merely mistaken prudential motives, was to be put forth, though without his concurrence, as his, the preparation and execution would be delayed until his end was so near, his strength so reduced, and his mind so inert, that he would probably be found incapable of opposition to a proposition pressed

upon him. Between these conflicting views of the subject the Courts below were called on to decide, and their conclusion does not appear to their Lordships unreasonable or against the weight of evidence.

Their Lordships think, therefore, on a careful view of the evidence, that the case is not taken out of the operation of the rule laid down in 9 Moore, which has been frequently asserted and constantly acted on. Their Lordships will therefore humbly advise Her Majesty that the Appeal be dismissed, with costs.

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