

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Shojaut Ally Khan and another v. Mussa-
mut Mukhdoom Jan, from the High Court
of Judicature at Fort William in Bengal;
delivered 28th November 1872.*

Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS was a suit brought by the Respondent Mussamut Mukhdoom Jan, claiming dower which she alleged was settled upon her at the time of her alleged marriage with Bakur Ally Khan, against the wife of Bakur Ally Khan and two of his sons by that wife. The suit necessarily involved the consideration of the question of marriage, and, accordingly, two issues were settled, one raising the question whether the Plaintiff had been married to Bakur Ally Khan, and the other raising the question whether the amount of dower which she claimed was really agreed upon at the time of the alleged marriage?

A great deal of evidence was gone into in the suit before the Principal Sudder Ameen, and some of the general facts of the case are beyond dispute. It appears that Bakur Ally Khan was a Mahomedan of some station and property, that he was married and had children living with him, two sons and two daughters, in the family house. It is also proved beyond all doubt that the Plaintiff was originally by profession a dancing girl, and that her parents were

persons whose occupation was certainly disreputable. The mother appears to have been a prostitute, and the father a procurer, and the girl had lived with them and had followed the profession of a dancing girl, when she attracted the favour of Bakur Ally Khan, who appears to have formed an attachment to her; and the first we hear of the connection is, that she came to his house and danced. It seems that he afterwards took her into his house to reside, and there is some evidence of the way in which she was treated there, and in which she conducted herself whilst under his roof. It does not appear that she lived a secluded life. The highest that the evidence proves in her favour is, that occasionally she was behind the purdah, but that frequently she came out of it and lived in public, and visited other places. Whether or no she ever followed her former profession, or was known by other men during the time that she was living in the house of Bakur Ally Khan, is not very clearly shown. But the manner of cohabitation raises in itself no presumption that she was living with him as a wife. On the contrary there is much in it to support the contrary presumption. Therefore the proof of this marriage must really rest upon the direct evidence which has been given of the actual contract, and upon consideration of certain undisputed facts which are relied on to support it, and the weight to which those facts are entitled.

It is quite unnecessary for their Lordships to go into a minute analysis of the evidence of the witnesses who were examined, because the Principal Sudder Ameen in whose presence they were examined, and who is himself a Mahomedan, formed his opinion of the weight due to them, and has in a very careful judgment stated his reasons for coming to the conclusions he did respecting them. The witnesses who say that they were present at a marriage state that some 16 or 17 years before the death of Bakur Ally Khan a contract of marriage was openly made between

Bakur Ally Khan and the Plaintiff, and that at the time of that marriage it was agreed that he should give her a sum of 10,000 rupees as deferred dower. The marriage and the agreement for the dower formed one transaction. The Principal Sudder Ameen came to the conclusion that the witnesses who were called to prove the marriage and agreement are entirely unworthy of credit; and, therefore, he was of opinion that he must find both issues against the Plaintiff. He accordingly found that, in his judgment, the marriage was not proved, and of course as a consequence that the other issue as to dower must also be found against the Plaintiff.

It was quite sufficient to dismiss the suit as far as relief went that the agreement to give dower was negatived by the judgment of the Principal Sudder Ameen. The Plaintiff appealed against that judgment, and upon the case being heard, the High Court, whilst agreeing with the Court below in the finding as to the dower, came to an opposite conclusion on the issue of marriage. They, indeed, agree in the view of the evidence taken by the Principal Sudder Ameen upon the actual marriage which the witnesses had endeavoured to prove. They find that those witnesses are not entitled to credit, and they therefore agree with the Principal Sudder Ameen that the witnesses who were called to prove the *factum* of the marriage are utterly unworthy of belief. But the High Court, notwithstanding they go so far with the Principal Sudder Ameen, came to the conclusion that the issue ought to have been found in favour of the Plaintiff, viz., that there was a marriage between her and Bakur Ally Khan; and accordingly they modified the decree of the Principal Sudder Ameen to that extent, and in their own decree inserted a declaration that the Plaintiff was married to Bakur Ally Khan.

It seems to their Lordships extremely doubtful whether that declaration was warranted by the

original plaint. The plaint simply sought relief by recovery of the dower. However, it is not necessary to go into any discussion as to the technical propriety of that declaration, because their Lordships are clearly of opinion that the reversal of the judgment of the Principal Sudder Ameen on that issue by the High Court was erroneous. The High Court had certainly not so favourable an opportunity of judging of the witnesses as the Court below had; but they seem to have formed the same opinion of their credibility, so far as they sought to prove the agreement for dower. But if those witnesses are disbelieved as to the dower, it would seem to be a necessary consequence, in good sense, that they should be disbelieved as to what they say about the fact of the marriage. It may be that a witness may say that which is untrue upon some particular fact in the case, and you cannot disbelieve him as to the whole of what he states. But here is one transaction. The marriage and the agreement for dower are so blended together that it is impossible, as it seems to their Lordships, to rely upon witnesses as to one part of the transaction who were disbelieved as to the other. Therefore, as far as the direct evidence of the marriage goes, their Lordships think that it does not sustain the affirmative of the issue, viz., that the Plaintiff was married to Bakur Ally Khan.

The High Court having gone so far with the Principal Sudder Ameen, still arrive at the conclusion that the marriage may be established, and that they may give credit to a marriage having at some time occurred between these parties, in consequence principally of certain admissions which Bakur Ally Khan is said to have made to four witnesses. The High Court rely upon those admissions, and say they were made to witnesses whom the Court below did not look upon as wholly undeserving of belief. But with regard to one of those witnesses, Busharut Ally, the Principal Sudder Ameen

certainly came to the conclusion that he could not rely upon him; and he gives several reasons showing that the witness had some ill feeling towards the members of this family, and that he may have had some interest, being connected with Villaet Ally, who was the nephew of the mooktear, and the mooktear himself was said to have been the protector of the Plaintiff after her husband's death. He gives these reasons for disbelieving him, and, therefore, when the High Court thought he was entitled to credit by reason of faith having been accorded to him by the Principal Sudder Ameen, they erred in making that supposition. With regard to the other witnesses, they appear to be pleaders of the Court, and a certain amount of reliance was placed upon them by the Principal Sudder Ameen. But, in the first place, the admissions are very slight and general. They are simply that Bakur Ally Khan is said by these witnesses to have told them that he was married to the Plaintiff. He may have had reasons of his own at the time for saying so, although the fact had been otherwise; reasons for justifying himself for keeping up a connection with her and having her in his house, where the rest of his family lived.

However that may be, their Lordships think that it would be extremely dangerous to rely upon admissions made by a deceased man of his marriage when he could not be brought to contradict them, and when those admissions are not supported by trustworthy evidence of the fact of the marriage or of other facts which would tend to show that a marriage had taken place.

Independently of these admissions, the other facts in the case which the High Court adduce as leading them to the conclusion that this marriage had taken place are, first, that the Plaintiff cohabited with Bakur Ally Khan in the family house, and that she lived in the family house to some extent secluded, as (the judges say) the wife in a Mahomedan family would do.

That she did live there for some time is proved, but their Lordships think the High Court have strained the evidence too much in favour of the Plaintiff, in saying that she lived there as a wife in a Mahomedan family. Looking at the evidence it really does not seem to be so. She was only partially secluded, and if she appeared frequently in public, as the evidence shows she did, then she was not living secluded in the way in which the wife of a Mahomedan of rank would be likely to do.

The only other fact relied on is that there was a daughter of the Plaintiff who passed as the daughter of Bakur Ally Khan, whom he gave away upon her marriage. That is by no means a conclusive fact, because if she was his daughter or he believed her to be so, although illegitimate, he might have been induced, from motives of affection, to give her away on her marriage.

On the whole, their Lordships think that they can best rely upon the judgment of the Principal Sudder Ameen, that judgment being to a very great extent supported by the opinion of the High Court itself upon the value of the evidence; and, therefore, they must advise Her Majesty to reverse the judgment of the High Court, which varied the original decree, and to affirm the decree of the Principal Sudder Ameen. The Respondents must pay the costs of the Appeal.