

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mahomed Bauker Hoossain Khan Bahadoor v. Shurfoon Nissa Baigum, an infant, by Syed Fareed, her Grandfather and next friend, from the Supreme Court of Judicature at Madras; delivered June 20, 1860.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.
SIR JOHN TAYLOR COLERIDGE.

SIR LAWRENCE PEEL.
SIR JAMES WILLIAM COLVILE.

THE question in the present appeal from the Supreme Court of Judicature at Madras, between Mahometans, is whether, upon the evidence in the case, the Appellant ought to be considered as the lawful brother of Shasavar Jung Bahadoor, that is to say, the lawful son of Oomdut Ool Oomrah, a Mahometan, formerly Nawab of the Carnatic, the father of Shasavar Jung Bahadoor, who having survived Oomdut Ool Oomrah for more than half a century, died at Madras in the year 1856.

The point arose in a suit, in the Court already mentioned, for administering the estate of Shasavar Jung Bahadoor, the decree in which, dated the 9th February, 1858, directed, among other things, a reference to the Master of the Court, to inquire and report whether the Appellant was a brother of Shasavar Jung Bahadoor, and directed that for that purpose the Appellant (not a party to the cause), should be at liberty to go before the Master.

The Appellant, availing himself of this permission, carried in a state of facts and charge before the Master, which (contained in p. 10 of the Appendix) is in these terms :—

“ That the Master was directed to inquire and report to the Court whether the said Mahomed Bauker Hoossain Khan Bahadoor is a brother of Shasavar Jung Bahadoor, the intestate in the pleadings of this cause named.

“ That Shasavar Jung Bahadoor, the said intestate, was the son of Oomdut Ool Oomrah Bahadoor, Nabob of the Carnatic, now deceased.

“ That the said Oomdut Ool Oomrah Bahadoor, Nabob of the Carnatic, the father of the said Shasavar Jung Bahadoor deceased, was, some three or four years prior to his death,* married, in the form usual amongst Mahometans for performing Nicka marriages, to one Ameen Sahiba, alias Buddee Beebee.

“ That the said Mahomed Bauker Hoossain Khan Bahadoor was the only issue of the said marriage, and was the son of the said Oomdut ool Oomrah Bahadoor, Nabob of the Carnatic, by his Nicka wife, the said Ameen Sahiba, alias Buddee Beebee,† and is therefore the brother of the said Shasavar Jung Bahadoor deceased.

“ That the said Mahomed Bauker Hoossain Khan Bahadoor has, from the date of his birth up to the present time, been acknowledged, treated, and received by the Governor in Council in Madras, by the Nabobs of the Carnatic, his relations, and by the late Shasavar Jung Bahadoor, deceased, in his life, and by his relations and friends, as the son of the said Oomdut Ool Oomrah Bahadoor, Nabob of the Carnatic, and as the brother of the said Shasavar Jung Bahadoor, deceased.

“ That the said Mahomed Bauker Hoossain Khan Bahadoor and Shasavar Jung Bahadoor, deceased, were, on the death of their father, the said Oomdut Ool Oomrah Bahadoor, Nabob of the Carnatic, on the representation of the family of the said Oomdut Ool Oomrah Bahadoor, the Nabob of the Carnatic, on the 29th day of September, 1801, acknowledged by Lord Clive, then Governor of Madras, to be the sons of the said Oomdut Ool Oomrah Bahadoor, the Nabob of the Carnatic; and a pension of 10,000 rupees was granted to each of them, the said Shasavar Jung Bahadoor, deceased, and the said Mahomed Bauker Hoossain Khan Bahadoor, as the Nicka sons of the said Oomdut Ool Oomrah Bahadoor, the Nabob of the Carnatic, deceased, which pension has since been and still is paid to the said Mahomed Bauker Hoossain Khan Bahadoor.

“ That the said Mahomed Bauker Hoossain Khan Bahadoor has been admitted by the Defendants Mayroon Nissa Baigum and Madar Ool Oomrah Bahadoor to be the brother of the said Shasavar Jung Bahadoor, the former by her counsel and proctor on the hearing of the ecclesiastical suit in the Supreme Court, in

* Amended this 15th April, 1858, to “ on or about the month of December.”

† Amended this 15th April, 1858, “ and was born on the 10th June, 1800.”

which her right as widow of the said Shasavar Jung Bahadoor, deceased, was established and declared, and by the said Madar Ool Oomrah Bahadoor in the late Nabob's Maukamah Court, and in certain writings under his hand."

The claim was opposed on behalf of the Respondent, the daughter and only child of Shasavar Jung Bahadoor, and evidence was adduced on each side in support of it and against it. Upon the whole of the evidence (it is set forth in the Appendix), the Master reported in the Appellant's favour, finding that the Appellant was the son of Oomdut Ool Oomrah, by "his Nickah wife" Ameen Sahiba, and was the brother of Shasavar Jung Bahadoor. But exceptions to the Report were taken by the Respondent, and, upon argument, decided in her favour by the Supreme Court; a decision that produced the appeal now before their Lordships, which was argued here fully and very well.

The Exceptions and the Order allowing them (which will be found in pp. 40 and 41 of the Appendix), are thus:—

"First Exception.—For that the said Master hath, in and by the said Separate Report, rejected the Exhibit C, mentioned and set forth in his said Report, and offered as evidence on behalf of the Plaintiff, in support of her state of facts and charge left in this cause on the 23rd day of April, 1858; whereas the said Master ought not to have rejected such Exhibit C, but ought to have admitted it as evidence for the said Plaintiff.

"Second Exception.—For that the said Master hath, in and by the said Separate Report, found that Mahomed Bauker Hoossain Khan Bahadoor is the brother of Shasavar Jung Bahadoor, the intestate, in the pleadings of this cause named; whereas the said Master ought to have found that the said Mahomed Bauker Hoossain Khan Bahadoor is not the brother of the said Shasavar Jung Bahadoor, deceased.

"Wherefore the said Plaintiff doth except to the said Master's Separate Report, and appeal therefrom to the judgment of this Honourable Court."

"The matter upon the exceptions taken by the Plaintiff to the Separate Report of Charles Martin Teed, Esquire, the Master of this Honourable Court, dated the 10th day of June last, made in pursuance of the decree made on the hearing of this cause, and bearing date the 9th day of February last, coming on to be argued this present day before the Honourable the Supreme Court of Judicature at Madras, in the presence of counsel learned on behalf of the said Plaintiff and Mahomed Bauker Hoossain Khan Bahadoor; and the said Exceptions and Report being opened, upon debate of the matter, and hearing what was alleged by the counsel on both sides: This Court doth order that the said Exceptions be allowed, with costs of the proceedings had before the said Master, and of this application and order.

"By the Court."

In the view that their Lordships take of the matter, the first exception is unimportant, for, whether the document to which it relates be considered or not considered as part of the evidence, the conclusion as to the question of legitimacy must, according to their Lordships' opinion, be the same; and with regard to that question, their Lordships find it to be, if not established, at least highly probable, that the Appellant, who seems now to be between fifty-eight and sixty-two years of age, was born in the house of Chaittore Begum, a Nickah wife of Oomdut Ool Oomrah; and it appears to be clear that he (the Appellant) is the son of a woman who was a protégée, or dependent, if not a servant, of that lady. She seems to have brought up the Appellant's mother, Ameen Sahiba, mentioned in the Report, and to have taken an interest in her. It appears likely that Ameen Sahiba, from a time preceding her adolescence until the death of Chaittore, had no other home than the residence of Chaittore, and that Oomdut Ool Oomrah, whether legitimately or illegitimately, was the father of the Appellant, and so, from the time of his birth, reputed generally to be; their Lordships, by using the term "reputed generally," not, however, meaning to affirm or deny that there ever was any acknowledgment of the paternity by Oomdut Ool Oomrah. He (Oomdut Ool Oomrah) died before the year 1802, and was survived for several years by Chaittore. She was survived for several years by Ameen Sahiba, and since the death of Ameen Sahiba some years have elapsed.

More than once in the proceedings before us, Ameen Sahiba is described as a slave. Their Lordships, however, believe, and it has been, by the counsel on each side, at the bar, expressly and distinctly admitted that she was not so. Their Lordships, accordingly, for every purpose of the present litigation, assume that Ameen Sahiba, during her whole life, was free.

Chaittore, who seems not to have had any child of her own, appears to have adopted the Appellant from the time of his early childhood, if not from the time of his birth, and thenceforth during the whole of her life to have treated him as her son; and both the Appellant and his mother lived continually, as it seems, with Chaittore until her death—

the Appellant from his birth, his mother from a time preceding that event. The Appellant's examination in support of his state of facts contains but an indistinct and indirect, if it contains any, allegation that his mother was the wife of Oomdut Ool Oomrah.

Proceeding on the basis of these remarks, their Lordships deem it necessary or convenient now to divide the evidence into two portions: the first consisting of the testimony of two widow ladies, named Shurfoon Nissa Baigum, and Fakroon Nissa Baigum (pp. 12, 13, 14, Appendix), and the second consisting of all the rest of the evidence; and to consider the second portion previously to considering the first; and, in considering the second portion, to deal with it as if the first were not existing. So viewing the evidence, their Lordships are of opinion that what has just been described as the second portion of it is insufficient to support the Appellant's contention that he is the legitimate, or legitimated, son of Oomdut Ool Oomrah. By the second portion of the evidence it is not shown that there was at any time a ceremony of marriage between him and Ameen Sahiba, or that she at any time claimed or professed, or represented herself to be his wife or widow, or was at any time acknowledged by him as his wife, or was by the Government or otherwise at any time recognized or treated as his wife or widow. Though five other ladies, as his widows, had allowances from the Government, she had none.

The case, too, thus regarded, there is no proof that Oomdut Ool Oomrah at any time treated, recognized, or acknowledged the Appellant as his son, and it does not (we think) help the Appellant that, soon after his alleged father's death, the Appellant, as a member of Oomdut Ool Oomrah's family, had a pension from the Government, which the Appellant still enjoys, and which there seems to their Lordships to be no reason in point of justice, fairness, or propriety, why he should not continue to enjoy. That pension was, with the assent and concurrence of the family of Oomdat Ool Oomrah, certainly allotted to the Appellant, then a minor, in very early childhood, as a son of Oomdut Ool Oomrah, but also as the son of Chaitore, which, by adoption, though by adoption alone, as already

mentioned, the Appellant was : nor can he, in our opinion, be taken to have had, or to be enjoying, any Government pension or Government allowance whatever, in the character of a son of Ameen Sahiba. It was for the pecuniary interest of Chaittore, with whom the mother and the son were living, to represent the Appellant as Chaittore's son, and if Ameen Sahiba was not a widow of Oomdut Ool Oomrah, it was for her interest also, and that of the Appellant, that he should not be represented as her son. Their Lordships are of opinion, that unless the testimony forming what their Lordships term the first portion of the evidence ought to be deemed credible and of some weight, the Appellant's claim fails. Is, then, Shurfoon Nissa Baigum, or Fakroon Nissa Baigum, a credible witness? They have deposed thus :—

“ Shurfoon Nissa Baigum, a widow, residing at No. 25, in Amyapah Moodelly Street, at Royapettah, within the local limits of Madras, produced, the 19th day of April, 1858, for examination before the Master in support of the state of facts and charge of Mahomed Bauker Hoossain Khan Bahadoor, left in this cause, having been first duly sworn, said : I know Mahomed Bauker Hoossain Khan. I knew his mother and his father, who was my brother. There was a girl inside the house ; he married her by Nickah. The Nabob Oomdut Ool Oomrah married by Nickah Ameen Sahiba. Some time after the Nickah marriage Bauker Hoossain was born. Immediately on the birth of the child he was given in adoption to Chaittore Baigum. I was present at the Nickah. The Nickah was read outside. The people came in, tied a Lutcha, and put a nose ornament. The Lutcha was tied on Ameen Sahiba, and the nose ornament was put on her ; I cannot say who by, there were so many persons present. I do not know if any of the people are alive except us two. After the Nickah ceremony Oomdut Ool Oomrah and Ameen Sahiba lived as husband and wife. After Bauker Hoossain Khan's birth Ameen Sahiba was in the Chaittore Baigum's house. Bauker Hoossain Khan has been treated by myself as my brother's son, as my nephew. I knew Shasavar Jung ; he was the son of my brother Oomdut Ool Oomrah. Shasavar Jung's mother was Koolsoon Baigum, who brought him up, and Bauker Hoossain was brought up by Chaittore Baigum.

“ *Cross-examined by Mr. Wilkins.*—Ameen Sahiba was a child of a poor man ; I do not know his name. Ameen Sahiba was not a slave girl in the family ; she was the child of a poor nobleman, who, being unable to support his child, he gave the child to be supported by Chaittore Baigum. I know this because we were in the habit of going to Chaittore Baigum's house, and she in the habit of coming to us. Upon asking Chaittore Baigum, she said it was a poor nobleman's child, and I bring her up ; she did not say who the poor nobleman was, and we did not ask. I was present when the Nickah took place. I was not in the

Dewanah Khanah when the Nickah was read and took place. I was among the assembly of the females. Ameen Sahiba died lately, about seven or eight years ago.

“Re-examined by Mr. Ritchie.—Ameen Sahiba lived in Chaittore Baigum’s house up to the time of her death.

“Examination of Fakroon Nissa Baigum.

“Fakroon Nissa Baigum, a widow, residing at No. 16, in Vencatachellum Chetty Street, at Triplicane, within the local limits of Madras, produced the 19th day of April, 1858, for examination before the Master in support of the state of facts and charge of Mahomed Bauker Hoossain Khan Bahadoor left in this cause, having been first duly sworn, saith: I know Mahomed Bauker Hoossain Khan Bahadoor. I knew his mother; she was called Ameen Sahiba, but commonly known by the name of Buddee Beebee; she married Oomdut Ool Oomrah by a Nickah ceremony. Oomdut Ool Oomrah was my brother. I was present at the ceremony. This was many years ago. It took place in the Chepauk Garden. I cannot say when Mahomed Bauker Hoossain Khan Bahadoor was born, but he was about a year or a year and a quarter old when his father died. I knew the late Shasavar Jung Bahadoor; he was my nephew; he was the step-brother of Mahomed Bauker; when they were young they were received as brothers and played together; when they grew up they remained separate. Mahomed Bauker was brought up by Chaittore Baigum, who was the mother of Shasavar Jung. Mahomed Bauker was born after the Nickah marriage of Ameen Sahiba. Oomdut Ool Oomrah used to call the child to him, see it and caress it, and treated him as he did Shasavar Jung. Mahomed Bauker has been received by myself and other members of Oomdut Ool Oomrah’s family as his son.

“Cross-examined by Mr. Wilkins.—I am seventy-five years old. Ameen Sahiba was the daughter of a poor woman, who was not a slave girl; I do not know who the father of Ameen Sahiba was. I do not know if the Cauzee was present at the time of the Nickah marriage. The ceremony took place outside, and the ladies were all collected inside of the house on occasion of the ceremony. I was in the assembly. I saw the Nickah was read; it was read in the Dewan Khanah; afterwards the people came where the ladies were, and congratulated each other. I was not present in the Dewan Khanah when the Nickah ceremony was read. After this was read outside, the people came in where the ladies were, and tied the Lutchah and put the Nuttoo. The Nuttoo was put in the nose of Ameen Sahiba; I do not recollect who did this. The Lutchah was tied on the neck of Ameen Sahiba; I do not recollect who tied the Lutchah. Before her marriage Ameen Sahiba was a Mussulman’s child, a poor man’s child; and was brought up in the house of Chaittore Baigum. Ameen Sahiba is dead; she lived many years after Mahomed Bauker’s birth. I do not know anything more of the Nickah than I have said. I know nothing about the dowry.

“Re-examined by Mr. Ritchie.—I did not hear the Nickah read. Ameen Sahiba was inside the Zenahnah with the females during the whole of the marriage ceremony. Ameen Sahiba was of a marriageable age at the time of the ceremony. After the ceremony Ameen Sahiba lived in the house of Chaittore

Baigum. Chaittore Baigum was the wife of Oomdut Ool Oomrah."

Whatever may have induced the ladies to give this testimony, their Lordships find themselves unable to credit it. They think it very highly improbable that if a ceremony of marriage between Oomdut Ool Oomrah and the Appellant's mother of any such kind as that stated, or of any kind, had taken place with such a degree of publicity as that alleged by the two ladies, or with anything like it, the fact would not have been proved also by some other witnesses or witness, notwithstanding the lapse of time. Nor do their Lordships believe that Chaittore or Ameen Sahiba would so have conducted herself, or so acted, as they respectively appear to have done, if there had been any such marriage. The conduct of both is so strongly opposed to the notion of a marriage between the protégée, dependant, or servant, and the husband of the protectress, patroness, or mistress, as to render it impossible for their Lordships to think that such a marriage took place, upon the foundation merely of the evidence before them. Why had not Ameen Sahiba, why did she not claim, a house or establishment of her own? Why did she continue in that of Chaittore? Why not have, why not claim, an allowance from the Government? Why concede, as she seems to have conceded, her son to Chaittore? Why rest contented or discontented in the humble and dependent, and almost, if not altogether, ignominious position in which she remained, when five wives of the Prince (her husband as now alleged) had establishments and allowances agreeing with his rank? Their Lordships think that not a single portion of the evidence of either of these two ladies can be trusted, and if that is so there is (it cannot be necessary to repeat) no proof that Ameen Sahiba was ever married, nor proof that she ever represented herself as a married woman, or as a widow, nor proof of any acknowledgment on the part of the alleged father by word or deed, by language or conduct, that he was her husband, or the father of her son.

Their Lordships, therefore, hold that the judgment under appeal is right, unless as to costs. But in arriving at this conclusion, they wish to be

distinctly understood as not denying or questioning the position that, according to the Mahometan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahometan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation.

Here there is, in their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference.

With regard to costs, however, their Lordships do not impute to the Appellant either wilful or corrupt perjury, or subornation of perjury; and, therefore, not merely from the Master's opinion, but from the circumstances of the case also, they consider the Appellant's claim, though untenable, so excusable that they will humbly recommend to Her Majesty that the Appellant should not be subjected to any costs (except his own) of the proceedings before the Master, or of those before the Supreme Court; that the order before them should so far, and only so far, be varied; and that there should be no costs of the present Appeal.
