

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Kha-
jah Gouhur Ali Khan v. Khajah Ahmed
Khan from the late Sudder Dewaney Adaw-
lut of Calcutta ; delivered 29th May 1873.*

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is an Appeal in a suit originally brought in the Civil Court of the City of Patna by the present Appellant, Khajah Gouhur Ali Khan, who was the nephew and one of the heirs of Mahomed Ibrahim Khan.

The suit was brought by him as one of the heirs, together with a lady Fatima-toonissa, who was the mother of Mahomed Ibrahim Khan, against Khudijah Begum, who claimed to be the widow of the deceased Mahomed Ibrahim Khan. After his death she, claiming as his widow, obtained, in a summary suit brought in the Civil Court at Patna, possession of one fourth of his property, under the provisions of Regulation XIX. of 1841. It appears that there was an Appeal in that summary suit to the Sudder Court, which affirmed the order.

The present suit was brought in regular form to set aside those summary orders and to obtain possession of the one fourth of the property which Khudijah Begum had retained under them, upon the allegation that she had been divorced

by Ibrahim Khan, and the only question raised which it is now necessary for their Lordships to consider is, whether Khudijah Begum was divorced or not. It was alleged by the mother and the nephew that a divorce had taken place in the year 1845. The Judge of the Civil Court of Patna decided in favour of the claim of the widow. There was an appeal to the Sudder Dewanny Adawlut, but no decision was given by that Court upon the present issue. It appears that in a former suit, where the legitimacy of Khajah Gouhur Ali Khan, as the nephew of Mahomed Ibrahim Khan, was in issue, a decision had been given against his being the legitimate nephew; and the Sudder Dewanny Adawlut, on the Appeal to them in this suit, affirmed the decision of the Judge of the Civil Court of Patna, not upon the ground upon which he had decided, but on the ground that the Appellant had not proved himself to be the legitimate nephew.

The case, therefore, comes before their Lordships substantially on Appeal from the decision of the Civil Court Judge. The question is entirely one of fact, and their Lordships are unable to come to the conclusion that the Judge of the Civil Court of Patna was wrong in holding that the divorce was not proved. The claimant was the wife of Mahomed Ibrahim Khan. She had been married a considerable number of years to him but undoubtedly there had been a separation as early as the year 1827, and in that year suits had been brought both by the husband and the wife. The husband brought a suit in the nature of a suit for restoration of marital rights against the wife; and she brought a suit against him to recover her dower, or so much of her dower as was prompt, and in both these suits, which were continued about five years in the Courts, decrees were given for the Plaintiffs; one in the year 1831, and the other in the following year, 1832;

that is, the husband obtained a decree for the restitution of conjugal rights, and the wife obtained a decree for the share of her dower which was prompt. It seems that from 1832 down to 1845 no steps were taken to enforce the decrees on either side. There is no evidence as to the terms upon which the husband and wife were living in that interval of time, but it would seem that they were living apart.

In July 1855 both parties presented petitions in their respective suits, praying that satisfaction might be entered upon the decrees. The petitions alleged that they had compromised the suits, and desired to abandon any rights that they might respectively have under their decrees. Those petitions clearly indicate that up to that time no divorce had taken place. Although there had been a separation, although these decrees had been obtained and the parties had lived separately, yet no dissolution of the marriage by divorce had at that time taken place. Indeed, it is not contended on the part of the Appellant that a divorce had then been effected, but it is said that a short time afterwards Mahomed Ibrahim Khan went to the house of his wife, and that there was a formal divorce, or the commencement of a formal divorce; that words of divorce were then spoken by him and assented to by her, and that this formal divorce was repeated on two other occasions, at intervals of a month between each formal act.

The question is, whether their Lordships can rely upon the evidence of the witnesses who say that such a transaction took place. The same witnesses who are called to prove the divorce assert that shortly after this alleged divorce Khudijah Begum married a Mahomedan of wealth and rank of the name of Mahomed Hossein, and lived with him openly in the city of Patna. The Plaintiff asserts not only the

divorce but the second marriage,—that the second marriage took place in the lifetime of Mahomed Ibrahim Khan, and shortly after the divorce.

Now, it is to be observed in the first place, that there is no writing whatever produced to prove that the divorce took place or to corroborate the statement of the witnesses. It is quite true that writing is not necessary to the legal validity of a divorce under Mahomedan law, but where a divorce takes place, as in this case, between persons of rank and property, and where valuable rights depend upon the marriage and are affected by the divorce, one would certainly expect that the parties, for their own security, would have had some document which should afford satisfactory evidence of what they had done. In the suit for restitution of conjugal rights Mahomed Ibrahim Khan himself spoke of the necessity of such a document when the wife alleged that he had before that suit divorced her, which shows that in his contemplation (although he was wrong in supposing that it was necessary) it might be expected that amongst persons in his position such a document would have been executed. However, there is no such document; there is no writing whatever referring to the divorce, and therefore the case depends entirely upon the credit to be given to the witnesses, who say that they were present during the transaction, and who also say that they were present at the second marriage. Of course if the second marriage during the lifetime of Mahomed Ibrahim Khan had been satisfactorily proved it would of itself have been cogent evidence of the fact of the divorce, but that marriage is even less satisfactorily proved than the divorce itself. The witnesses who deposed to both transactions being the same, the divorce derives no substantial confirmation from the evidence which has been given of the subsequent marriage.

The Judge of the Civil Court of Patna heard these witnesses. They were all examined in his presence, and it is impossible not to consider that the Judge who hears the witnesses is really the best person, and very often the only person, who can judge of the credit to be given to them, because he not only hears what they have to say, but he observes the manner in which they say it. He is also much more conversant with the general position of the persons who come before him than any court of appeal can be. What he says of the witnesses is that their depositions are unworthy of any credit. He further says that, with the exception of one or two, the whole were illiterate and low people, and they certainly seem to be so.

Then, on which side is the balance of probabilities? The case on the part of the Appellant is that this lady, in the lifetime of her first husband, married and lived with Mahomed Hossein in the city of Patna, and one or two of the witnesses, when asked how they knew it, say that it was impossible for a man of the rank and wealth of Mahomed Hossein to be married without the people in the city of Patna knowing it. If this be so, it certainly seems a most improbable circumstance that Mahomed Hossein, a gentleman of position in Patna, should have allowed his wife to come forward in the Court of Patna and claim a share of the estate of Mahomed Ibrahim Khan, upon the assumption that she was his lawful wife down to the time of his death. That is, in their Lordships' view, a very strong improbability.

Then, with regard to dower; if she had been divorced she would have been entitled to her dower, not only to the prompt dower but to the whole of it; but she neither sued for her dower nor is there any arrangement satisfactorily proved with regard to her remission of it.

One or two witnesses say that she did, behind the curtain, use the words that she had remitted

the dower, but only one or two of the witnesses venture to say that, and it does seem incredible that if she was entitled to a large dower, she should have given it up without the husband obtaining from her some writing or other authentic evidence of her having so released it, particularly as she had once before sued for the prompt dower and had obtained a decree, and that suit was very formally compromised by the petition to which reference has already been made.

There is an improbability referred to by the Judge of the Civil Court with regard to the ceremony alleged to have taken place on the second marriage. It appears that the lady was of the Soonee school, and Mahomed Hossein of the Sheeah, and the Judge says what appears to be well founded, viz., that the ceremony would usually be according to the school to which the husband belonged. In this case it was the other way. That is an improbability, and it may be that these witnesses, who, many of them, were ignorant persons, were not aware, when they gave their evidence, that it would be open to the observation that it was an improbable story they told.

It is to be observed that, according to some witnesses, the cazee was present at the second marriage. If this be true, the cazee should have been called as a witness; but he was not examined, nor his absence accounted for.

Their Lordships think it unnecessary to go at any detail into the evidence. They see no reason for coming to a different conclusion from that at which the Judge of the Civil Court at Patna has arrived, and they do not feel justified in saying that he is wrong when he has recorded that the witnesses who came before him were, in his opinion, unworthy of credit. If they are unworthy of credit, as the whole case depends upon

their testimony, and the onus is upon the Plaintiff to prove the divorce which he alleges, the case necessarily fails.

Although, in their Lordships' view, the decree of the Sudder Court ought to be affirmed, their opinion proceeds upon the ground on which the Civil Judge of Patna dismissed the suit, and not upon that on which the Sudder Court affirmed his decision. The affirmance of this decree will not, therefore, prejudice the status of the Appellant as the nephew of Mahomed Ibrahim Khan.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the Sudder Dewanny Adawlut, which is the judgment appealed from, and to dismiss this Appeal, with costs.

