

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Musammat Maqboolan v. Ahmad Husain and Others, from the Court of the Judicial Commissioner of Oudh ; delivered the 10th November 1903.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

In this case the Subordinate Judge of Barabanki found that the Appellant Musammat Maqboolan, sued as a minor under the guardianship of her mother Ghafooran, was the legitimate offspring of Ghulam Ali who died intestate in 1892 without leaving any other issue, and that she was consequently entitled to succeed to the property of which Ghulam Ali died possessed. The Judicial Commissioners on appeal reversed this finding and adjudged the property to the Respondents who were Plaintiffs in the suit and whose title as heirs to Ghulam Ali in default of issue of his body is not now in dispute.

Both Courts have held that Maqboolan is the daughter of Ghafooran by Ghulam Ali. The question is whether she was born in lawful wedlock. That depends upon whether her mother Ghafooran was free to marry and did in fact marry Ghulam Ali.

It is common ground that Ghafooran, when first heard of in this case, was the wife of a person now living—one Eda, a Sepahi, a man of a class inferior to that of Ghulam Ali who was a Sheikh. She had four children by Eda. Having been deserted by her husband at a time when there was famine in the land, she took service with Ghulam Ali. That was some 16 years before his death. Ghulam Ali's first or only wife, Mashukan, was then living. Mashukan died in 1878 and Ghafooran continued to live on in Ghulam Ali's service. She lived with him till his death. She is described as an attractive person, and there was no other woman in the house.

The case on behalf of Maqboolan is that some time after Mashukan's death Eda returned home, and then there was a quarrel between Eda and his wife. Either he suspected her of too great intimacy with Ghulam Ali or she charged him with familiarity with some prostitute, or more probably there were mutual recriminations. At any rate she refused to leave Ghulam Ali's house for Eda. She was not going to starve with him. That was her answer (says one witness) to her husband's appeals. So he divorced her, and after the divorce Ghulam Ali married her by the rite or ceremony called Nika.

In support of these allegations there is oral evidence direct and positive. Eda himself and one other witness speak to the divorce. Seven witnesses, one of whom says that he performed the ceremony of reading the Nika, speak to the marriage. It is quite true that these witnesses cannot be regarded as independent witnesses. But they do not seem to have been shaken on cross-examination, and the Subordinate Judge, who heard what they said and saw their demeanour, accepted their statements. It would be out of the question to reject their evidence on

mere suspicion. The story in itself is not improbable. It is difficult to see what further or better evidence could have been offered assuming the story to be true. According to the evidence no register of marriages or divorces was kept then. A marriage such as that set up on behalf of the Appellant—a marriage with a woman of his own household and of inferior birth—would presumably not have been celebrated with any sort of pomp or ceremony. There was no music, said one witness, or feasting either. Besides Ghulam Ali seems to have led a very retired life. He had little intercourse with his neighbours and none at all with the Respondents who lived at a considerable distance and apparently never came near him. Whatever his relations towards Ghafooran before his alleged marriage may have been, he bore the reputation of a religious and respectable person. Then there is some evidence that he treated Ghafooran as his wife. As to Maqboolan she was born in his house. In her case he performed the ceremonies usual in the case of a legitimate daughter. He had her well educated and taught to read Urdu and Persian.

The Judicial Commissioners, who reject the evidence of the witnesses at the trial, comment on the fact that various reasons are assigned for the alleged quarrel between Eda and his wife. Perhaps it is not surprising that Eda should have attempted to clear himself at the expense of his wife, while Ghafooran's adherents put the blame on him. Then the Judicial Commissioners point out that the witnesses who deposed to Ghafooran's marriage with Ghulam Ali could not fix the year or even the season of the year when it took place. That does not seem very extraordinary. After the lapse of so many years, when there was nothing in the circumstances of the marriage to impress their memory, they may well have borne in mind

that there was a marriage without being able to recall anything in particular about it. With more reason the Judicial Commissioners comment on the circumstance that the person who states that he read the Nika was not the regular Qazi, but the Naib or deputy of the Qazi, and they justly observe that the reason alleged for the intervention of the deputy is not satisfactory. No doubt this circumstance is suspicious. But the man was examined before the Subordinate Judge who saw no reason to disbelieve him.

Although the Judicial Commissioners, upon these grounds and on a general view of the position of the witnesses, thought themselves justified in describing the oral evidence as of little value, it does not appear that they would have differed from the Subordinate Judge if they had not come to the conclusion that the whole of the evidence adduced on behalf of the Appellant was displaced by a document put in evidence by the Respondents to which the Subordinate Judge—erroneously, as they thought—attached little or no importance.

The document in question is a certified copy of a statement by Ghafooran taken before Lieutenant-Colonel E. E. Grigg, Deputy Commissioner of Barabanki, on the 30th of April 1890 on the occasion of a criminal charge brought at the instance of Zainab, one of Ghafooran's daughters by Eda, against her husband Ali Husain for an assault. The heading of that statement is in these words:—  
 “Musammat Ghafooran, wife of Eeda, caste  
 “Sheikh, age 40 years, of Dewa, on solemn  
 “affirmation:”—and it contains the following  
 passage, “I have lived with Ghasetay”—that is  
 Ghulam Ali—“these 12 or 14 years. I lived  
 “with him before his wife died, two years before  
 “that event.” This document was included in  
 the list of documents filed with the plaint, but it

does not seem to have been referred to in the course of the trial until the Pleader for the Plaintiffs was in the act of addressing the Court after the evidence was closed. The Pleader for the Defendant objected that it was inadmissible. On behalf of the Plaintiffs it was contended that Ghafooran defending as guardian of Maqboolan was a party to the suit, and that under the Indian Evidence Act the statement was admissible as an admission by her. The Subordinate Judge ordered it "at present . . . to remain " on the file for what it is worth." In the Judgment which he afterwards delivered the learned Judge seems to have considered the document admissible, but his opinion was that the heading of the statement was not part of Ghafooran's deposition, and it does not seem to have occurred to him that the statement in the deposition that the deponent was living with Ghulam Ali and had been living with him for 14 years was susceptible of the meaning that she was living with him in adultery. The Judicial Commissioners however held that "Ghafooran must have been questioned " by the Magistrate as to her name, husband's " name, caste, age, and residence. Her answers " they go on to say " were a part of the deposition " as much as any other answer." Proceeding on this view they held that Ghafooran's statement was "fatal to the case of the Defendant " that Ghafooran was divorced by Eda and " subsequently married Ghulam Ali." Accordingly they found that "she was not divorced " by Eda and was not married to Ghulam Ali," and that when she said she had "lived" with Ghulam Ali for 12 or 14 years and had done so for two years before the death of his wife, she meant that "she had cohabited with him." It appears to their Lordships that the construction

which the Judicial Commissioners have put upon her language is harsh and uncalled for. She seems for some reason or other to have been asked how long she had been living with Ghulam Ali and to have answered correctly enough "for 12 or 14 years." It is difficult to suppose that the Magistrate, if it was the Magistrate by whom the question was asked, intended to convey any imputation on the witness, and equally difficult to suppose that the witness intended by her answer to make a confession of immorality. As regards the description of the witness in the heading of the deposition, their Lordships agree with the Subordinate Judge that it is no part of the deposition proper, that is, no part of the evidence given by the witness on solemn affirmation. It may have been elicited by questions put by the Magistrate. It is just as likely that it was filled in by a subordinate official and on the paper when put into the hands of the Magistrate for him to take down the evidence of the witness. Again it may have been read over to the witness by the Magistrate when the evidence of the witness was completed, or the Magistrate may have contented himself with reading over the narrative embodying the evidence, which was all he was bound to do under the Act.

In these circumstances, even assuming that there was no slip or accidental omission in the heading of the document and that there was no confusion between the two husbands in the mind of the person who took down the heading, and assuming that the document is admissible in this Suit as evidence against Maqboolan's claim, their Lordships are of opinion that it is not entitled to any weight.

Differing from the Judicial Commissioners on the only ground upon which they appear to have

relied in reversing the Court of First Instance, their Lordships see no reason for not accepting the finding of the Subordinate Judge.

Their Lordships will therefore humbly advise His Majesty that the Decree of the Court of the Judicial Commissioner ought to be reversed with costs and the Judgment of the Subordinate Judge restored.

The Respondents will pay the costs of the Appeal.

