

Privy Council Appeal No. 114 of 1927.

Allahabad Appeal No. 36 of 1925.

Nuh-Ullah Khan and others - - - - - *Appellants*

v.

Mohammad Shafiq-Ullah Khan - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND MAY, 1929.

Present at the Hearing :

LORD CARSON.

LORD ATKIN.

LORD SALVESEN.

[*Delivered by* LORD CARSON.]

The only point for determination in this appeal is whether the defendants-appellants are the legitimate sons of one Enayat Ullah Khan. The said Enayat Ullah Khan, who was a Sherwani Pathan, died on the 30th April, 1916. The plaintiff-respondent is the son of Enayat Ullah Khan, and he brought the present action against the appellants to recover possession of certain property of his father, Enayat Ullah Khan, the ownership of which they claimed as being the sons of Enayat Ullah Khan by the second wife, and therefore the step-brothers of the respondent.

Whatever may have been the earlier contentions of the respondent, the case on the evidence at the trial was that the appellants were the sons of Enayat Ullah by Musammat Durga, the wife of one Cheta Dhobi, who used to live in the Mauza Enayati and who was still alive at the time of the births of the appellants respectively.

The appellants, on the other hand, claimed and made the substantive claim that they were the children of one Mahmuda Begam, a lady of Sherwani Pathani clan, to which Enayat Ullah Khan admittedly belonged, and not a Dhobin, that she was the daughter of Mansur Khan, and was the lawful wife of Enayat Ullah Khan.

The Additional Subordinate Judge of Aligarh, before whom the case was first tried, decided in favour of the appellants that they were the legitimate sons of Enayat Ullah, holding that the appellants' mother was a duly married wife of Enayat. From the judgment and decree of the Additional Subordinate Judge plaintiff-respondent appealed to the High Court, and his said appeal was heard by a Bench composed of Sulaiman and Kanhaiya Lal JJ., who on the 16th April, 1924, delivered separate judgments. The former judge was of opinion that the appeal should be dismissed, whereas the latter thought that the appeal should be allowed; in the result the appeal was dismissed and a decree passed accordingly.

Against the said judgment and decree of the High Court the plaintiff appealed under Section 10 of letters patent, and by a judgment dated 8th June, 1925, the plaintiff's (respondent's) appeal was allowed, and a decree was made establishing his title to the property, the subject matter of the action.

The matter now comes before the Board on an appeal by the appellants-defendants against such decree.

All the facts and circumstances of the case have been so fully considered from all aspects in the several judgments which have been delivered that their Lordships do not think it necessary to go at any great length into the details of the evidence. Their Lordships are of opinion that the judgment appealed from is right and that the learned Judges who delivered judgments had ample evidence before them to come to the conclusion at which they arrived, that the defendants were not the legitimate children of Enayat Ullah Khan, but were his children by a woman who was at the time proved to have been married, and that therefore no rules of presumption of legitimacy or marriage could avail the defendants.

It must be conceded upon the evidence, and indeed none of the Judges who have tried the case have found otherwise, that the connection between the defendants' mother and Enayat had commenced many years, probably fifty years, before the trial, and that it continued regularly for about forty years till the woman's death at Enayat Ullah Khan's house, about four years before the commencement of the action; that the defendants were brought up and treated by Enayat Ullah Khan as his legitimate sons, and that the correspondence produced shows that the plaintiff respondent himself treated them in every way during his father's lifetime as if they were his step-brothers. It was certainly not an unreasonable finding by the Subordinate Judge that this fact raised a very strong presumption in favour of the marriage of defendant's mother and Enayat Ullah Khan, or, to use his own words, "a semblance of marriage." Their Lordships are of opinion that the Subordinate Judge was so impressed by this branch of the case that he failed to give full weight to the evidence of the substantive case proved upon behalf of the respondent. They agree with the appellate tribunal that what-

ever presumption may be raised from these facts cannot prevail against the conclusions, if they are supported by the evidence, that, as alleged by the respondent, the defendants were the children of Musammat Durga, a wife of one Cheta, and were not, as had been alleged by the defendants, the children of Mahmuda Begam, a Sherwani Pathan and a daughter of Mansur Khan, who was himself a Sherwani Pathan. It is in the contrast of the evidence supporting their inconsistent cases that it appears to their Lordships that the Subordinate Judge failed to realise the strength of the respondent's and the weakness of the appellants' cases respectively.

Without going through the evidence in detail it is proved by five close relations of Enayat Ullah Khan, including the respondent, that the defendants were the children of Musammat Durga, the wife of Cheta Dhobi, that their mother was a Dhobin by caste and not the daughter of Mansur Khan. One of these witnesses was a brother of Enayat Ullah Khan, another was his sister, a lady of 80 years of age, and another a sister some 60 years of age. Then there was a daughter of Enayat Ullah Khan's brother and her husband. Their Lordships agree with the appellate court in thinking that the Subordinate Judge was in error in rejecting too lightly the evidence of these witnesses on the ground that they were not independent and impartial, as it is impossible to see what better class of evidence in such a case as the present can be produced than by near relatives of the parties concerned. It is difficult to see why, if the story of the defendants was true, these relations would have any reason whatsoever to have any particular bias for the plaintiff in preference to the defendants, as they would be equally related to both of the parties, and certainly until the bringing of this action there seems to be no evidence of any hostility or unfriendliness between the parties. There is also other evidence of caste people and old residents of the village of Enayat itself, not connected with the family, who have come forward to support the plaintiff's case.

Now, in addition, there is the evidence of Baldewa, which is of the greatest importance, and, of course, if true, is conclusive of the plaintiff's case. He has sworn that he was a son of Cheta and that his mother was Musammat Durga, that she became the mistress of Enayat Ullah Khan, and that after that Cheta kept a woman in his keeping, who gave birth to two sons, *i.e.*, Puran and Gobardhan, both of whom he alleged are living. There is nothing whatever proved against Baldewa, and he was admittedly the son of Cheta, and as Cheta only died about 15 years ago, and the two sons alleged to have been born, Puran and Gobardhan, are still said to be alive, it is impossible to conceive that, if he was making definitely false statements, it would not have been possible to produce evidence to show that his allegations were inventions, and who the wife of Cheta was. As the High Court has said, "There is no reason why Baldewa should try to throw discredit on his mother, Musammat Durga, or involve his own

family into disgrace if she had not actually left the protection of Cheta and gone to live with Enayat Ullah Khan." It is to be observed that the Subordinate Judge, while describing Baldewa as the plaintiff's most important witness, gives no reason or makes no suggestion as to why he should not be considered a truthful witness.

If, therefore, the evidence put forward on behalf of the respondent is to be disbelieved, it follows that there was a deliberate conspiracy to make a false case and to suborn perjury without any reasonable or adequate suggestion as to why such a conspiracy should have been entered into. On the other hand, when the substantive case put forward on behalf of the appellants, viz., that the appellants' mother was Musammat Mahmuda Begam a Sherwani Pathan and not a Dhobin, that her father was Mansur Khan, a Sherwani by caste, and that witnesses called for the appellants were present at the marriage, their Lordships feel no doubt that the High Court were entirely justified in disbelieving the evidence produced. Indeed, it is not clear how far, if at all, either the Subordinate Judge or the learned Judge of the High Court who supported him, relied upon this branch of the case put forward on behalf of the appellants, and the same learned Judge stated that he was prepared to admit that the defendant's mother did not belong to the brotherhood of Enayat Ullah Khan. Further, as the appellate court has pointed out, "if Mansur Khan migrated to the village of Enayati, to which the parties belong, he must have had some means of subsistence, and, like most of the residents of the villages, must have been a cultivator. This would leave some trace of his existence in the village records; but no such trace was available."

One other fact was relied upon by the appellants. It appears that, on the death of Musammat Durga, a suit was brought for recovery of Rs. 170 by the appellants against their father Enayat for the recovery of the dower debt alleged to be due to their late mother. Enayat confessed judgment in the suit, and this fact was claimed as an admission by Enayat of the fact that Musammat Durga was his lawful wife. All the judges of the High Court have found that this suit was a collusive one, and having regard to the insignificant amount and the fact that Enayat allowed himself to be sued and a judgment obtained, it cannot be doubted that the sole object of the litigation was to have a record which could be put forward as supporting the factum of Enayat's marriage with Musammat Durga.

Contrasting, therefore, the evidence put forward in support of the affirmative cases made by the respondent and the appellants respectively, their Lordships can find no reason for differing from the reasoning and conclusion arrived at and set forth in the judgment of the High Court of the 8th June, 1925, and they will accordingly advise His Majesty that this appeal should be dismissed with costs.

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In the Privy Council.

NUH-ULLAH KHAN AND OTHERS

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MOHAMMAD SHAFIQ-ULLAH KHAN.

DELIVERED BY LORD CARSON.

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