PRIVY COUNCIL.

Before Lord Shaw, Lord Warrington of Clyffe, Lord Atkin, Sir John Wallis and Sir Lancelot Sanderson.

MOHABBAT ALI KHAN (PLAINTIFF) Appellant

versus

MUHAMMAD IBRAHIM KHAN AND OTHERS (DEFENDANTS) Respondents.

1929

March 7.

Privy Council Appeal No. 53 of 1928.

On Appeal from the Court of the Judicial Commissioner, North-West Frontier Province.)

Muhammadan Law—Marriage—Legitimacy—Continuous Co-habitation—Acknowledgments— Presumption — Clan addicted to Concubinage—Admissibility of Evidence—Absence of Parda.

The son of a Muhammadan by a female servant in his house claimed a declaration of his legitimacy. The parents had continuously co-habited for many years, and the father on several occasions had acknowledged the plaintiff as his son. There was some evidence of a *nikah* marriage.

Held that evidence that other members of the father's clan had illegitimate children by servants was inadmissible to rebut the presumption of legitimacy arising from the acknowledgments, and that though the fact, that the mother unlike the father's other wives was not *parda nashin*, was one to be considered, it was insufficient to interfere with the presumptions of law or the balance of proof of the fact of legitimacy.

Decree of the Judicial Commissioner reversed.

Appeal (No. 53 of 1928) from a decree of the Court of the Judicial Commissioner (January 24, 1927), reversing a decree of the District Judge, Kohat.

The appellant, a Muhammadan, sued claiming (*inter alia*) a declaration that he was the lawful son of Khushdil Khan, deceased. The District Judge

1929

MOHABBAT ALI KHAN v. MUHAMMAD IBRAHIM KHAN.

made a decree accordingly, but it was reversed on appeal to the Court of the Judicial Commissioner.

The facts and the grounds of the decisions appear from the judgment of the Judicial Committee.

1928 Dec. 3, 4. DEGRUYTHER K. C. and PARIKH, for the Appellant.

DUNNE K. C. and WALLACH, for the Respondents.

As to the presumption of legitimacy arising from acknowledgments reference was made to *Fuzeelun Beebee* v. *Omdah Beebee* (1), *Sadik Husain Khan* v. *Hashim Ali Khan* (2), *Imambandi* v. *Mutsaddi* (3), *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury* (4), *Ameer Ali's* "Mahommedan Law" (3rd ed.), vol. II, pp. 255, 256, and Wilson's "Anglo Muhammadan Law," ss. 84, 85 ; and as to the observance of *parda* in the North-Western Provinces to *Jamil-ud-Din* v. *Abdul Majeed* (5).

The judgment of their Lordships was delivered by—

LORD SHAW—This is an appeal from a decree of the Judicial Commissioner for the North-West Frontier Province, dated the 24th January, 1927, which set aside a decree, dated the 14th April, 1925, of the Court of the District Judge, Kohat. The District Judge had decreed that the appellant is the legitimate son of one *Khan Sahib* Khushdil Khan. The Judicial Commissioner reversed this judgment and dismissed the plaintiff's suit.

The plaintiff was born in 1906. It is not disputed that he is the son of Khushdil Khan by

(1) (1868) 10 W. R. 469, 474.
(2) (1916) I. L. R. 38 All. 627, 661 : L. R. 43 I. A. 212, 231.
(3) (1918) I. L. R. 45 Cal. 878, 890 : L. R. 45 I. A. 73, 82.
(4) (1921) I. L. R. 48 Cal. 856 : L. R. 48 I. A. 114.
(5) (1915) 13 All. L. J. 361.

1929

MOHABBAT ALI KHAN v. MUHAMMAD IBRAHIM KHAN.

Mussammat Babo. Various questions were raised in the case, but the only point remaining for determination in this appeal is whether the appellant is the legitimate son of Khushdil Khan, that depending upon whether Khushdil and *Mussammat* Babo were married persons.

In August and September, 1923, Khushdil had serious attacks of illness, accompanied by paralysis and aphasia. While still suffering from these diseases he, on the 2nd April, 1924, executed a deed of gift by, as was alleged, making his thumb impression upon the deed after the provisions thereof had been carefully explained to and assented to by him.

This part of the case drops out, both Courts below having concurred in finding that Khushdil was proved to have been mentally incapable of understanding the deed on account of his illness, and that the deed was therefore invalid.

The remaining part of the suit, however, is head 1 of the plaint, which asks the Court to pronounce a declaratory decree "that plaintiff is the lawful son of the said *Khan Sahib* Khushdil Khan," and upon this the Courts below have differed. If the plaintiff is the lawful son he is the sole male heir of Khushdil and the property rights in the deceased's estate would be regulated accordingly.

The question whether Khushdil and *Mussammat* Babo were married is one of fact, and as such was investigated and has been summarized with the utmost care by the District Judge. A most important part of the case attempted to be made by the respondents was that such a marriage was legally impossible because at the time of the marriage, and the birth of the appellant, the lady was already married to one

1929

MOHABBAT ALI KHAN
v.
MUHAMMAD IBRAHIM KHAN.

Ilyas. The respondents plead that "her husband Ilyas died six or seven years ago and she was bound to him by *nikah* up to that time." Had this been established it would, of course, have been a complete answer to the appellant's suit. Both Courts below, however, have agreed that there was no such marriage and that the body of evidence produced to that effect is altogether untrustworthy. As the District Judge puts it, "the story that Ilyas was married to *Mussammat* Babo is fictitious."

What remains accordingly is of a limited scope. But it must be observed that the witnesses denying the marriage of *Mussammat* Babo with Khushdil are very largely the same persons who allege the fictitious story of her marriage with Ilyas. This circumstance does not seem to have had attached to it by the Judicial Commissioner the weight which was its due.

It is unnecessary for the Board to recapitulate in detail the evidence given in the case. They are satisfied that the conclusion upon that evidence, oral and documentary, and taken as a whole, by the District Judge, was sound.

Was there a *nikah* ceremony? It is in evidence that it was solemnised by Imam, who is one of the witnesses: a cousin of the bride, now dead, acted as *padar vakil*, that is agent for the bride. Two others who acted as the required witnesses are also dead. Three other persons have given evidence in support of the marriage. It is possible to criticise with much effect such oral evidence, but fortunately the case does not stand upon this alone. The life history of the parties has to be considered.

Upon that there can be no doubt that Khushdil, the father, acknowledged Mohabbat Ali Khan, the

plaintiff, as his son, and this in circumstances which were clearly equivalent to an affirmation that he was a legitimate son. Shortly after the boy's birth, namely, in August, 1906, Khushdil Khan stated on oath that he had got a son. This meant the appellant, who was his only son at the time. Further, the son and his mother lived in family with Khushdil, and continued to do so from his birth in 1906 to the date of Khushdil's death in 1925. The circumstances of the family were these. Before the marriage to *Mussammat* Babo, Khushdil Khan had already married thrice, but about the year 1903 only two of his wives were alive. By one of these wives he had one daughter. There were also born to him two sons by another of his wives, but they died before 1904, and he had only a daughter alive. As the Judicial Commissioner says in his judgment :—

"It seemed unlikely that he would beget a son from any of his existing wives, and in a desire to have male offspring he may well, argues counsel for plaintiff, have turned to a maidservant of his own household in the hope of obtaining it; there would, therefore, have been nothing unnatural in a marriage between the two."

The argument, the learned Commissioner thinks, is far from convincing, and he refers to a certain view which he entertains as to the practice of other members of the family than Khushdil. To that allusion will be subsequently made.

These being the domestic facts, it is not questioned that the appellant and his mother lived continuously in the deceased's house, and the appellant was brought up as one of his family. One fact in particular may be alluded to. When the boy reached

1929

MOHABBAT ALI KHAN
v.
MUHAMMAD IBRAHIM KHAN.

school age a notable circumstance is that Khushdil signed an application to the Headmaster, Government High School, Kohat, saying:—

"SIR,

"I request you to kindly admit my son Mohabbat Ali in the School. The necessary information is given on reverse (below).

"I herewith produce the School Leaving Certificate. I hereby declare that he has not been admitted so far in any recognised school."

The appended information includes the following:—

"Date of birth—1st January, 1906.

"Father's name—Khushdil Khan, *Rais*, Kohat.

"Caste or tribe—*Mussalman, Afghan*, Izzat Khel."

This is signed by Khushdil in his own hand, giving the particulars of his own son and his own tribe, the date being 11th April, 1919. Two years later a leaving certificate is given that "Mohabbat Ali Khan, son of *Khan Sahib* Khushdil Khan, attended the Government High School, Kohat District, from 11th April, 1919, to 2nd April, 1921." This certificate was applied for by Taj Mohammad Khan, a cousin of Khushdil, and in the application he referred to the appellant as "my brother's son, Mohabbat Ali Khan."

Further, a number of transactions relating to land, and in revenue records, appear from documents produced, in which the appellant is described by Khushdil and his relatives and others as "Khushdil's son." The documents have been produced, and they are referred to in detail in the judgment of the Dis-

trict Judge; it is sufficient to say that they appear to demonstrate with clearness both the sonship and the legitimacy of the appellant. The father took much interest in his upbringing, and there are letters between both the father and the son on the one hand, and other members of the family on the other, showing that the interest in his upbringing and education was shared by these relations. Throughout the transactions and correspondence referred to, no suggestion of any kind appears to the effect that Mohabbat was illegitimate. The entire body of facts is confirmatory of his legitimacy.

The law applicable to such a case is quite settled. As Dr. Lushington, delivering the judgment of the Board, observed in *Khajah Hidayat Oollah* v. *Rai Jan Khanum* (1) :—

" where a child has been born to a father, of a mother where there has been not a mere casual concubinage but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan Law, the presumption is in favour of such marriage having taken place."

According to Sir R. K. Wilson's " Digest of Anglo-Muhammadan Law," section 84 :—

" In all cases in which marriage may be presumed by co-habitation, combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purposes of establishing paternity."

Section 85 may be also quoted :—

" if a man has acknowledged another as his legitimate child the presumption of paternity arising

(1) (1844) 3 Moo. I. A. 295, 318.

1929

MOHABBAT ALI KHAN v. MUHAMMAD IBRAHIM KHAN.

therefrom can only be rebutted by (to confine the instances to the one relevant).....(*d*) proof that the mother of the acknowledgee could not possibly have been the lawful wife of the acknowledger at any time when the acknowledger could have been begotten."

Evidence upon this last head was, as already mentioned, admitted under the allegation that the appellant's mother was married to Ilyas, but proof of the allegation completely failed.

The present case accordingly is one of an acknowledgment by the father, an acknowledgment which involves the assertion that he, the father Khushdil, was married to *Mussammat* Babo, the appellant's mother. Such acknowledgment undoubtedly raises a presumption in favour of the marriage and of the legitimacy.

The presumption is no doubt rebuttable, and if there is proof *aliunde* on the subject to the effect that there was no such marriage in fact, the same position is reached as if no such marriage had been possible. A recent instance of positive disproof of the marriage was *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury* (1). As Lord Dunedin put it:—

"Such acknowledgment in face of the fact that there was no marriage is of no avail," and the general law was summed up in the same judgment as follows:—

"A claimant son who has in his favour a good acknowledgment of legitimacy is in this position: the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the *onus* is

(1) (1921) I. L. R. 48 Cal. 856; L. R. 48 I. A. 114.

1929

MOHABBAT ALI KHAN v. MUHAMMAD IBRAHIM KHAN.

on him to prove a marriage. Once he establishes an acknowledgment, the *onus* is on those who deny a marriage to negative it in fact."

It would accordingly appear clear that it rests upon the respondents in this case to establish that there was no marriage.

It might not be considered necessary to enter into any question of presumption of proof, as their Lordships find themselves in agreement with the District Judge to the effect that the marriage is proved; and they do so on a broad induction of the oral and documentary evidence as a whole. But their Lordships think it expedient to deal with the reasons which have induced the Judicial Commissioner to differ from the District Judge. He correctly says:—

"The law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years. There is ample authority for this position, which will be found cited in a ruling of the Lahore High Court, *Indar Singh* v. *Thakar Singh* (1)."

He then proceeds as follows:—

"The strength of the presumption, however, will obviously vary according to the circumstances of each particular case, and the habits of the Izzat Khel clan in the matter of concubinage with maidservants and slave girls can scarcely be described as normal. We know of four certified cases of sons born of slave girls (*kanizakzadas*). These are Mawaz, son of Sharbat; Manawar, son of Ata Mohammad Khan; Khushal, son of *Nawab Bahadur* Sher Khan; and Abdul Rahman, grandson of *Nawab Bahadur* Sher Khan. It is on the record, or has been held by the Courts, that Mawaz

(1) (1921) I. L. R. 2 Lah. 207.

1929

MOHABBAT ALI KHAN v. MUHAMMAD IBRAHIM KHAN.

was the only one of these four whose father entered into a lawful marriage with his mother. The other three were the offspring of concubines outside wedlock. The names of other *kanizakzadas* have been mentioned, so that there are at least four and probably several more of such cases amongst the immediate descendants of Sher Ali Khan, *i.e.*, the family with which we are now concerned. The presumption in favour of legitimacy arising from continuous cohabitation over a period of years is one which is based on public policy, and in the case of Muhammadans, no doubt, on the well-known doctrine of Muhammadan law, which abhors bastardy. In a family like the present, however, which pays scant regard to the matrimonial tie in the begetting of children from women of low caste, the presumption, in my opinion, must be so small as to be practically negligible. It might operate as a factor to turn the scale where the evidence for and against a marriage is equal, but it is not sufficient to transfer from a claimant son some obligation to prove his own legitimacy. So the burden of proof may be regarded as being equally distributed over the parties."

The Board think it right to say at once that it can give no countenance to the doctrine here set forth. It amounts to this, that the proof as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relatives; an estimate is to be formed as to whether on the whole these relatives prefer the tie of concubinage to that of marriage. The suggestion further appears to be: that the facts of the particular case, in which evidence is given *pro* and *contra* bearing upon the issue of marriage, are not to be regulated

1929

MOHABBAT ALI KHAN v. MUHAMMAD IBRAHIM KHAN.

by the well-known presumptions of law, but that these presumptions are to be wiped out by reason of the conduct and mode of life and predilections of other persons. Each case of each of these relatives would have required to be separately investigated on its own merits: without that, the way is opened for family gossip on a wide scale, prompted by motives unknown and knowledge untested.

A further suggestion of which their Lordships cannot approve appears to amount to this: that a court of law on evidence such as is given here would pronounce a view to the effect that there was a clan proclivity towards concubinage rather than marriage, and therefore that marriage and the legal presumptions in favour of it cannot be sustained.

Their Lordships think it right further to say that the evidence on this subject should not have been allowed by the District Judge. He attached no weight to it himself, but it was not only without weight, it was without competence.

It remains to be added that undoubted difficulty arises in the case on account of the fact that the mother of the appellant was not a *parda nashin* lady. The other wives lived behind the *parda* according to the well-known Muhammadan habit. They were strict Muhammadans, young persons brought from Afghanistan. The third wife, *Mussammat* Babo, had been in fact a maidservant and housekeeper in the household of the deceased. When the marriage took place she continued her duties in the household and was not *parda nashin*. Even if that had involved or recognised a lack or disregard of social status, these things were essentially matters for herself and her husband to consider. But it is no part of the law of India

1929

MOHABBAT ALI KHAN v. MUHAMMAD IBRAHIM KHAN.

that to have lived and to remain behind the *parda* is a necessary part of a lady's legal marriage or a conclusive evidential fact. It is a circumstance to be considered when the fact of the marriage is in issue. But that issue is to be determined on a broad conspectus of the whole situation, including of course the *parda* item. In the present case, it is by no means sufficient to interfere either with the presumptions of law or the balance of the proof of fact.

Their Lordships will humbly advise His Majesty to allow the appeal and to restore the judgment of the District Judge: the costs of the case from that date, that is to say, in the appeal to the Judicial Commismissioner and to His Majesty in Council, to be paid by the respondents.

Solicitors for appellants: *Stanley, Johnson and Allen.*

Solicitors for first respondent: *T. L. Wilson and Co.*