

LAHORE HIGH COURT

Muhammad Hayat

Vs

Muhammad Nawaz

(Addison and Din Mohammad,JJ.)

26.02.1935

JUDGMENT

Din Mohammad,JJ.

1. The plaintiffs, who are collaterals of Amir Khan deceased, sued for a declaration that defendants 1 and 2 were not the legitimate sons of Amir Khan and that after the death of Amir Khan's widow, Mt. Ghulam Bibi, they and certain defendants, who did not join in the suit, would be entitled to Amir Khan's land. It was stated that Mt. Fateh, mother of defendants 1 and 2, used to live in Amir Khan's house, but that her nikah with Amir Khan was invalid on the ground that it had been contracted during the period of iddat. There was also a suit instituted by the same persons for a declaration that a gift of land made by Amir Khan to defendant 1 in 1926 should be declared void on the ground that the land was ancestral and Amir Khan was not competent to make the gift. Both these suits were dismissed and the plaintiffs have preferred an appeal only in the suit for a declaration that defendants 1 and 2 are not the legitimate sons of Amir Khan and that the reversioners would be entitled to succeed to the property left by Amir Khan on the death of his widow, Mt. Ghulam Bibi.

2. Mt. Fateh, mother of defendants 1 and 2, was divorced by Sardara on 21st March 1926. Amir Khan married on 7th May 1926, so that the marriage was undoubtedly contracted before the expiry of the iddat period. It is clear from the evidence of Sardara, her first husband, that Mt. Fateh, had left his roof 9 to 10 months before he divorced her, while defendant 1 Muhammad Nawaz was born on 20th August 1926, about five months after her divorce. All the commentators on Muhammadan Law, e.g., Tyabji, Wilson, Amir Ali and Mulla are in favour of the legitimacy of the children of Mt. Fateh on the ground that the marriage was merely invalid and not void.

3. In *Azizunnissa Khatun v. Karimunissa Khatoon*¹ it was held that, marriage with the sister of a wife was void and that the children of such a marriage were illegitimate and could not inherit. The same view was taken by Karamat Hussain, J. sitting alone in *Ata Muhammad v. Saiqul Bibi*²

He held that, in order to determine the legal nature of a marriage contract, "one has to look to the time at which it was entered into and not

¹(1896) 23 Cal. 130

²(1910) 7 I.C. 820

to any subsequent time". The Counsel for the appellants based his argument on these two authorities and went so far as to contend that the distinction which the Muhammadan Jurists had drawn between fasid and batil marriages was incorrect and should not be recognized. It is much too late, however, in the day to set up this contention. In *Taliemand v. Mahamad Din*³ a Division Bench held that Under the Muhammadan Law, governing the Hanafi sect, marriage with a wife's sister during the subsistence of the previous marriage with her sister was only invalid (fasid) and not void ab initio (batil), and the: issue of such marriage was legitimate and inherited the father's property.

4. This is a similar case to the present, the learned commentators placing a marriage during the iddat period in the same category as a marriage with a wife's sister. In *Tajbi v. Mowla Khan*⁴ the same view was taken by Sir Basil Scott, C.J. and Beaman, J. *Azizunnissa Khatun v. Karimunissa Khatoon*⁵ was dissented from. *Muhammad Shafi v. Raunaq Ali*⁶ a decision of a Single Bench of the Oudh Chief Court is on all fours With the present case. It was held there that a marriage contracted within the period of iddat, being only a fasid marriage, could give rise to a right of inheritance between married parties. *Kaniza v. Hasan Ahmad Khan 1926 Oudh 231(supra)* is a decision on all fours with *Taliemand v. Mahamad Din*⁷ and *Tajbi v. Mowla Khan 1917 Bom. 211* and in it also *Azizunnissa Khatun v. Karimunissa Khatoon*⁸ was dissented from. Another case which was referred to is ***Khurshed Jan v. Abdul Hamid Khan (1908) 6 P.R. 1908*** where a Division Bench held that according to Muhammadan Law the marriage with a fifth wife in presence of four living wives was merely invalid, but not void, and consequently the children of such marriage, though contracted by a widow succeed as lawful heirs to their father. According to the learned commentators this kind of marriage comes within the same category as the marriage in question in this case.

5. Reference was made by the learned Counsel for the appellants to *Jhandu v. Husain Bibi*⁹ where it was held that a marriage, though contracted by a widow during her iddat period, was void. This was a suit for restitution of conjugal rights and the lady was entitled to set up the defence that the marriage, if any, was invalid and not binding upon her. This authority, does not appear to be in point and the same remark applies to *Ilahia v. Imam Din*¹⁰ At the hearing of the appeal an affidavit made by Sultan Khan was put into the effect that the family of the parties was governed by Shia Law and not by Hanafi Law. This assertion is an afterthought and was put forward at this late stage because, it is alleged, the Shia Law differs from the Hanafi Law in the matter in dispute in this case. But it was at no time a part of the case of the appellants that they were governed by Shia Law and there was no pleading to that effect. It was impossible to allow this plea to be taken at this stage. There is therefore no doubt that the children of Mt. Fateh by Amir Khan, namely defendants 1 and 2, must be held to be legitimate sons of Amir Khan and entitled to inherit his estate, although the marriage contracted by their mother with Amir Khan

was an invalid or fasid marriage. The appeal must be dismissed, but no order will be made as to costs.

³1930 Lah. 907

⁵(1896) 23 Cal. 130

⁷1930 Lah. 907

⁹1923 Lah. 499

⁴1917 Bom. 211

⁶1923 Oudh 231

⁸(1896) 23 Cal. 130

¹⁰(1909) 29 P.R. 1909.