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Chandu Lal Agarwalla, Karta of Joint Family and of Firm Named Hanutram Lekram Agarwalla and anr. Vs. Bibi Khatemonnessa W/O SafikuddIn Ahamed and ors.

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Court : Kolkata

Decided On : Mar-27-1942

Reported in : AIR1943Cal76

Appellant : Chandu Lal Agarwalla, Karta of Joint Family and of Firm Named Hanutram Lekram Agarwalla and anr.

Respondent : Bibi Khatemonnessa W/O SafikuddIn Ahamed and ors.

Judgement :

1. These two appeals arise out of the partition suit No. 19 of 1936 of the Court of the Subordinate Judge, Jalpaiguri, instituted by one Khatemannessa Bibi, since deceased, for self and on behalf of her two minor sons claiming in all 0-8-7 7/10 pies share in the properties given in the schedule to the plaint as some of the heirs of late Safikuddin Ahammad. Admittedly the properties given in the schedule 'ka' to the plaint once belonged to Safikuddin Ahammad and he died on 11th March 1924. The present suit was instituted on 9th September 1936. The plaintiffs' case is that the said Safikuddin Ahammad married three wives, namely, Taibannessa who predeceased him, Bibi Tanjina Khatun (defendant 1 in this case), and Bibi Khatemannessa, plaintiff 1; and that he died leaving the following relations as his heirs:

1. Two wives (a) Bibi Tanjina Khatun (defendant 1), (b) Bibi Khatemannessa (plaintiff 1).

2. Five sons (a) Khalilur Rahaman (plaintiff 2), (b) Khatibar Rahaman (plaintiff 3), (c) Latifar Rahaman (died before suit), (d) Tahmidar Rahaman (defendant 3), (e) Tabiur Rahaman (defendant 2).

3. Two daughters (a) Sayeda Khatun (defendant 4), (b) Sufia Khatun (died before suit).

2. Latifar Rahman's heirs are the plaintiffs themselves. Sufia Khatun's heirs are her husband Moulvi Ahamad Hossain Prodhan (defendant 7) and two daughters Begum Umme Salema (defendant 6) and Begum Rabeya Khatun (defendant 7). The plaintiffs thus claimed 0-8-7 7/10 pies share of the properties left by Safikuddin Ahamed. It is not disputed that if the plaintiffs are the widow and sons of Safikuddin as stated in the plaint their share in the property will be 0-8-7 7/10 pies. It has been found by the Court of first instance that items 3, 7, 14,15, 17, 20, 21, 22, 23, 24, 27, 28, 30 and 36 of schedule 'ka' were sold away in execution of decrees for arrears of rent obtained by the landlords in suits to which the present plaintiffs were made parties as heirs of Safikuddin Ahmed and purchased by defendants 17 and 18. Consequently, the

plaintiffs' claims to these properties were barred by the provisions of Section 47 and Order 21, Rule 92, Civil P.C. The Subordinate Judge dismissed the plaintiffs' claim in respect of these properties, but allowed them their costs against defendants 17 and 18. There has been no appeal or cross-objection by the plaintiffs regarding these properties. Defendants 17 and 18 however have preferred an appeal against the decree for costs. This is F.A. 34 of 1939.

3. Defendants 1 to 7 are not contesting the claim of the plaintiffs. So far as the properties now in dispute are concerned the only contest is by defendants 9 and 14 and they are claiming the properties on the strength of mortgages given to defendant 14 by defendant 1 for self and as certificated guardian of her minor sons, defendants 2 and 3. Defendant 14 instituted suits in enforcement of these mortgages against these defendants 1 to 3, obtained decrees in them and put these properties to sale in execution of those decrees and purchased some of them himself, the others being purchased by defendant 9. Defendant 9 also claimed title to some of these properties on the strength of his purchase in execution of a decree for arrears of rent obtained by the landlord in suits to which the plaintiffs were not at all impleaded. It may be stated that in none of the above transactions and proceedings the plaintiffs were parties. The case of the contesting defendants was:

1. that the plaintiff 1 was not the widow of late Safiquddin Ahmed and that plaintiffs 2 and 3 were not the sons of Safikuddin; that plaintiff 1 was never married to Safikuddin; (2) that Safiquddin died leaving defendant 1 and defendants 2, 3, 4 and one Sana Khatun as his legal heirs; that they were in exclusive possession of the properties to the knowledge of the plaintiffs.

4. These defendants further contended

that in more than one suit the plaintiffs themselves declared that they were not the legal heirs of late Safikuddin Ahmed and defendants 1 to 4 in the presence of the plaintiffs asserted their exclusive right and title to the properties left by Safikuddin and there have been several decisions by this Court and other Courts that the plaintiffs are not the legal heirs of Safikuddin.

5. Fourteen issues were raised on the pleadings of the parties. Of these issues 5, 8 and 11 only will be relevant for the purposes of the appeals before us and these were as follows:

5. Is the suit barred by the rule of res judicata? Can the plaintiffs maintain the suit without setting aside the decrees and execution sales at which the defendants purchased the properties?

Are they bound by decrees and execution proceedings in which the defendants purchased some of the properties?

8. Was plaintiff 1 the legally married wife of Safiquddin Ahmed? Are plaintiffs 2 and 3 sons and legal heirs of Safiquddin?

11. Have the plaintiffs their alleged title to the disputed properties? If so, what is the extent of their share?

6. The learned Subordinate Judge decreed the plaintiffs' claim in respect of the

properties involved in this appeal on the following findings:

1. The issue as to whether or not Khatemannessa was the legally married wife of Safiquddin is not barred by the principle of res judicata;

2. (a) Safiquddin legally married Khatemannessa who was his maternal cousin, according to Mahomedan law and she was not his concubine; (b) the defence story that Khatemannessa was a maid servant in the house performing menial works both inside and outside the house, appearing in public road, accompanying Tanjina and others to railway station walking behind the carts, etc., is quite absurd.

3. Khatemannessa and her sons have all along been in possession and full enjoyment of their right in the properties left by Safiquddin and they had nothing to suspect that their right was being denied by anybody.

7. Defendants 9 and 14 have preferred an appeal from this portion of the decree and this is F.A. No. 7 of 1939.

In F.A. No. 7 of 1939.

8. Mr. Gupta appearing in support of the same raised only the following points:

1. That the issue as to whether Khatemannessa and her sons were the legal heirs of Safiquddin was barred by the principles of res judicata between codefendants in view of the prior decision on the matter in Kent Suit No. 1 of 1922.

2. That on the evidence on record the reasonable conclusion is that Khatemannessa was not married with Safiquddin.

3. That, in any case, the plaintiffs cannot be allowed to get their share in the property from the appellant except on payment of their share of the debt left by Safiquddin.

9. Mr. Gupta also formulated a fourth point for the appeal, namely 'that the title of the plaintiffs, if any, became extinct by adverse possession'. He, however, gave this point up in course of the hearing of the appeal and conceded that in view of the evidence on the record there was no substance in it. As has been stated above the case of the plaintiffs is that plaintiff 1 Khatemannessa Bibi was the legally married wife of Safiquddin and that plaintiffs 2 and 3 and Latifar Rahaman were the three sons of that marriage. The defendants in their written statement denied that plaintiff 1 was the legally married wife of Safiquddin and that her sons, plaintiffs 2, 3 and Latifar Rahaman were the sons of Safiquddin. On this pleading, therefore, the factum probandam before the Court was 'whether plaintiff 1 was married with Safiquddin and whether plaintiffs 2 and 3 and Latifar Rahaman were the issues of that marriage'. Though disputed at the hearing of the suit, it is no longer in dispute that plaintiffs 2, 3 and Latifar Rahaman were begotten by Safiquddin on plaintiff 1 Khatemannessa. The only fact now in dispute, therefore, is whether plaintiff 1 Khatemannessa was married with Safiquddin, and was so married before the birth of these children. The case of the plaintiff is (1) that Khatemannessa was related to Safikuddin as a cousin being his maternal uncle's daughter; (2) that she became an orphan when she was a mere infant of seven or eight years; (3) that Safikuddin, who admittedly was a respectable gentleman of substantial means, brought her up from that age as a member of his own family; and (4) that on the death of his first wife in 1912 he himself married her

and lived with her till his death; (5) that all the children were born of this marriage during this period.

10. Though at the hearing of the suit the defendants contested each one of these facts, they now admit : (1) that she became an orphan at the early age of seven or eight, (2) that since then she was brought up by Safiquddin in his own family, (3) that from sometime after the death of Safiquddin's first wife till his own death he cohabited with Khatemannessa in the same dwelling house with his admitted wife and children and begot children on her also, who were all born and brought up in the family house.

11. The only facts denied by them are (1) her relationship with Safiquddin as cousin, and (2) her marriage with Safiquddin. At the trial the defendants wanted to say that Khatemannessa was a mere maid-servant in the family, doing menial services of all sorts, both outdoor and indoor. This case has now been abandoned. The case of the defendants now is that she was a mere concubine of Safiquddin and all the children born of her were the issues of this concubinage.

12. In order to establish the factum of marriage the plaintiffs relied on, (1) the presumption arising in favour of the relationship of husband and wife from the now admitted fact of long, continuous, and exclusive cohabitation as man and woman, (2) the direct evidence of marriage given by the persons, (a) taking part in the solemnization of the marriage, P.W. 3, (b) attending the marriage; P.Ws. 2, 4, 5, 6, 7, 8, 14, 16; (c) invited to attend the marriage, though failing so to attend; P.Ws. 10, 23; (3) the evidence of opinion of certain relations as expressed by their conduct as to the relationship of husband a and wife between Safiquddin and Khateman; P.Ws. 11 and 17.

13. In order to counteract this evidence the defendants relied on (1) the evidence of some relations (a) who denied the factum of marriage (D.Ws. 31, 18) and (b) asserted that she was kept in concubinage (DWS. 18, 31) (2) the conduct as expressive of opinion as to the relationship (a) of certain relations (EX. S, EX. Z-25, Ex. Y-95, Ex. Y-149 and D.WS. 18, 31) (b) of certain officers of the family (Exs. Z-116, Z-81 (b) and D.W. Ram Pada Chatterjee) (3) alleged admissions by Khatemannessa herself (Exs. W. W-1, W-2).

14. They also urged that the question could not be re-agitated in this suit, it having been decided in a former Rent Suit No. 1 of 1922 in which the present plaintiffs and the admitted heirs of Safiquddin were arrayed as co-defendants. As the contesting defendants are claiming under the admitted heirs, that decision would operate as res judicata in their favour. It may be noticed here that so far as the claim of plaintiff 1 is concerned it is also a relevant question whether assuming that she had been married with Safiquddin, that relationship continued till the death of the latter. It is however not the case of the defendant that such relationship, if it existed at any time, ceased to exist subsequently before the death of Safiquddin. Moreover, under Section 4, Evidence Act, it is open to a Court upon proof of a marriage to hold as proved the subsistence of that marriage on later date, unless and until it is disproved : Ismail Ahmed v. Momin Bibi . As has been pointed out above, in the present case nothing has been pleaded against the subsistence of the marriage at the date of death of Safiquddin if there was such a marriage at all. Section 2(1), Evidence Act, prohibits the employment of any kind of evidence not specifically authorized by the Act itself:

What matters should be given in evidence as essential for the ascertainment of truth, it is the purpose of the law of evidence, whether at common law or by statute, to define. Once a statute is passed which purports to contain the whole law, it is imperative. It is not open to any Judge to exercise a dispensing power and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue : Srish Chandra Nandy v. Rakhalananda Thakur .

15. Whether or not the statute approaches the realisation of the hope for 'a system of evidence simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied' - it is this statute alone that can be looked into. It cannot be disputed that the Evidence Act does not contain any express provision making evidence of general reputation admissible as evidence of relationship : Lakshmi Reddi v. Venkata Reddi . Reputation is simply a cumulation of ordinary 'perception testimonies' heard and gathered and reduced to a single implied assertion, which assertion is now reported to the tribunal by the witness who perceived the cumulative assertions. The special weakness of reputation is the anonymity of the original assertors. All the considerations for hearsay testimony apply here. The other special weakness of 'reputation evidence' is the difficulty of checking the trustworthiness of the witness reporting it. Where a witness asserts that a reputation existed as to the particular relationship of some particular persons it is ordinarily impracticable to uncover his error, if any. Cross-examination, or other witnesses, may disclose grounds for doubt. But for the most part his assertion is likely to remain simply an assertion, dependent for its value on his own appearance and relationship to the parties. Section 50, Evidence Act, is the only provision which to a certain extent allows evidence somewhat akin to 'reputation evidence.' The section runs as follows:

When the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact....

16. Opinion means judgment or belief - what one thinks on a particular question - a belief, a conviction. So, when a Court has to judge as to the relationship of one person to another, it is permitted to take into consideration the 'belief' or 'judgment' of a person provided the requirements of this section are satisfied. The 'belief' is indeed a state of mind and can be evidenced by (1) external circumstances, calculated by their presence or occurrence to bring about the state of mind in question; and consequently showing the probability that the state of mind subsequently ensued; (2) conduct or behaviour illustrating and pointing back to the state of mind producing it; (3) a prior or subsequent state of mind indicating, within certain limits, its existence at the time in question. The section allows only 'conduct' as evidence of the opinion, a conduct, which is the expression, in outward behaviour, of the belief entertained. The conduct must be the result, the opinion being the moving cause. The results are the traces by which we may infer the moving cause. We are to infer from an observed effect, conduct, the probable cause a specific mental state. Conduct may reveal the belief of the actor in so far as the specific act is of a tenor which cannot well be supposed to have been willed without the inner existence of that belief. It should be remembered that in the present case the specific mental state - the opinion - the belief is not of itself material to the issue as a probandum. It is of service only evidentially, as forming a step of inference to some other fact (viz., the relationship)

which forms the ultimate object of the trial.

17. The section makes only 'opinion' as relevant and enjoins how this opinion itself is to be proved. It is only 'opinion as expressed by conduct' which is made relevant. This is how the conduct comes in. The offered item of evidence is 'the conduct'; but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision : its immediate effect is only to move the Court to see if this conduct establishes any 'opinion' of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer 'the opinion' the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion.' When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, the opinion of a person. It still remains for the Court to weigh such evidence and come to its own opinion as to the 'factum probandum' - as to the relationship in question. The state of the English law on the point at the time when the Indian Evidence Act was enacted in 1872 will appear from the following summary of the law to be found in the then edition of Taylor on Evidence, Section 584 of which runs as follows:

Again, family conduct, such as the tacit recognition of relationship, and the distribution and devolution of property is frequently received as evidence from which the opinion and belief of the family may be inferred, and as resting ultimately on the same basis as evidence of family tradition. For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material, in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or affinity. Thus, in the Berkeley Peerage case, Sir James Mansfield remarked, that 'if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate. So the concealment of the birth of a child from the husband - the subsequent treatment of such child by the person who at the time of its conception was living in a state of adultery with the mother - and the fact that the child and its descendants assumed the name of the adulterer, and had never been recognized in the family as the legitimate offspring of the husband - are circumstances that will go far to rebut the presumption of legitimacy, which the law raises in favour of the issue of a married woman. Again, if the question be whether a person from whom the claimant traces his descent, was the son of a particular testator, the fact that all the members of the family appeared to have been mentioned in the will, but that no notice is taken of such person, is strong evidence to show either that he was not the son or at least, that he had died without issue before the date of the will; and if the object be to prove that a man left no children, the production of his will in which no notice is taken of his family and by which his property is bequeathed to strangers or collateral relations, is cogent evidence of his having died childless.

18. This might have been the material source of the Indian Section 50. But it seems that the language used in the section makes the Indian law much more restricted. The section opens with the words : 'When the Court has to form an opinion as to the relationship.' These words would certainly mean 'as to the existence or the non-existence of the relationship.' But the opinion that is made relevant by the section is 'the opinion as to the existence of such relationship,' and not 'the opinion as to such relationship.' This may mean that 'the opinion as to the non-existence of such relationship' will not be admissible in evidence at all. A comparison of the language of

this section with those of Sections 47, 48 and 49 also seems to lend some support to this view. But in view of the facts of the present case, it is not necessary for us to pursue this matter further.

19. The persons whose opinion is made evidence by the section must be shown to have 'special means of knowledge on the subject.' So evidence under this section can come in only when the following requirements are fulfilled : 1. The person whose opinion is sought to be given in evidence must be proved to have special means of knowledge on the subject. 2. (a) The opinion alone is evidence; (b) the opinion as expressed by conduct only is evidence; or, in other words, (i) conduct only can be given in evidence; (ii) from the conduct given in evidence the Court is to see whether it is the result of any opinion held by the person. 3. The opinion which is relevant must be the one as to the existence of the relationship; (i) as has been pointed out above, the negative opinion - or the opinion as to the' non-existence of the relationship may not be relevant under this section. But the question does not fall to be decided in the present case. The defendants, no doubt, have offered in evidence conduct of certain near relations as expressive of this negative opinion. In our opinion, however, the offered items do not establish any such opinion at all and consequently it becomes quite unnecessary for us to consider whether a negative opinion is relevant under Section 50, Evidence Act. We shall discuss this evidence in its proper place. The plaintiffs, it has been stated above, also rely on the presumption of marriage arising from long continuous cohabitation. There can be no doubt that such a presumption arises in favour of the plaintiffs in view of the admitted facts of this case. In Mohabbat Ali Khan v. Md. Ibrahim Khan ('29) 16 A.I.R. 1929 P.C. 135 their Lordships of the Judicial Committee observed:

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 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 ('21) 8 A.I.R. 1921 Lah. 20.

20. In the case before the Judicial Committee there was an undoubted difficulty on account of the fact that the mother of the appellant was not a purdanashin lady. The other wives lived behind the purdah according to the well known Mahomedan habit. They were strict Mahomedans, young persons brought from Afghanistan. The third wife, Mt. Babo had been in fact a maid-servant and house-keeper in the household of the deceased. When the marriage took place she continued her duties in the household and was not purdanashin. In considering how far this fact went against the presumption of marriage raised by continuous cohabitation the Judicial Committee observed:

Even if that had involved or recognized a lack or disregard to social status, these things were essentially matters for herself and her husband to consider. But it is no part of the law of India that to have lived and to remain behind the pardah 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 pardah 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.

21. The law presumes in favour of marriage against concubinage when a man and a woman have cohabited continuously. Even if the direct evidence of marriage, if any, be unsatisfactory, this fact alone may not displace this presumption. Where there is prima facie evidence of cohabitation as man and wife, and a long course of treatment as a wife the presumption of marriage can be repelled only by evidence of the clearest character : Imambandi v. Mutsaddi ('18) 5 A.I.R. 1918 P.C. 11 In Khaja Hidayat v. Rai Jan Khanum (1841-66) 3 M.I.A. 295 at pages 317, 318, 323, the Right Hon'ble Dr. Lushington in delivering the judgment of the Judicial Committee quoted the following passages from MacNaughten:

The Mahomedan lawyers carry this disinclination (that is against bastardizing) much further; they consider it the legitimate course of reasoning to infer the existence of marriage from the proof of cohabitation.... None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short, where, by any possibility, a marriage may be presumed, the law will rather do so than bastardize the issue, and whether a marriage be simply voidable or void ab initio the offspring of it will be deemed legitimate.'

22. His Lordship then observed:

It may be observed that this is the statement of Mr. MacNaughten evidently after great deliberation on the subject, because he goes on to refer to what has been said by Sale; and he then observes - 'This I apprehend, with all due deference is carrying the doctrine to an extent unawarranted by law; for where children are not born of women proved to be married to their fathers, or of female slaves of their fathers, some kind of evidence (however slight) is requisite to form a presumption of matrimony.' He then observes - 'The mere fact of casual concubinage is not sufficient to establish legitimacy; and if there be proved to have existed any insurmountable obstacle to the marriage of their putative father with their mother, the children, though not born of common women, will be considered bastards to all intents and purposes. The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a casual concubinage but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such marriage having taken place.

23. This decision was given by the Judicial Committee in 1844, long before the Evidence Act was enacted and it appears from the same judgment that their Lordships looked upon this as a principle of evidence recognized in the Mahomedan system. It was observed:

We apprehend that in considering the question of Mahomedan law we must, at least to a certain extent, be governed by the same principle of evidence which the Mussalman lawyers themselves would apply to the consideration of the question.

24. This may not be the correct position after the enactment of the Evidence Act. But even after this Act the presumption has been raised in favour of marriage, from

similar facts and circumstances, as has already been pointed out : see also A. Dinohomy v. W.L. Balahamy ('27) 14 A.I.R. 1927 P.C. 185 and Sadik Husain Khan v. Hashim Ali Khan ('16) 3 A.I.R. 1916 P.C. 27. It has always been held, even after the enactment of the Evidence Act, that where the parties constantly, openly and continuously lived and cohabited together for several years and had several children and were regarded and recognized as man and wife by their relations and friends, these facts in the absence of countervailing circumstances afforded clear and conclusive evidence of marriage. This presumption will now arise under Section 114, Evidence Act, remembering that amongst the Mahomedans marriage may be constituted without any ceremonials and that adultery is a heinous offence according to Moslem faith. There is always a presumption against misconduct, against immorality and illegality.

25. Admittedly Khatemannessa was brought up by Safiquddin himself from the age of 8. The plaintiffs' evidence is that she was the daughter of Safiq's maternal uncle and the evidence on the point satisfactorily establishes this relationship. In any case Safiq was very kind to this orphan and took charge of her when she was only 7 or 8 years old. Admittedly she was not married to anybody else. Admittedly there was no legal bar to her marriage with Safiquddin. In these circumstances, unless we are prepared to assume that Safiq was a rogue, it is difficult to believe that a man of Safiq's position and disposition kept his own ward in the disreputable state of concubinage, utilising her only for the appeasement of his own sexual passions. There is absolutely nothing on the record to ascribe such character to Safiquddin and the subsequent conduct is equally difficult to explain unless we accept the proposition that Kheteman was Safiq'a married wife. Safiq might have a concubine. But it is preposterous to suggest that he was so devoid of all sense of decency and so oblivious to the duty of protecting the family morals that he could keep that concubine in the same family dwelling house with his married wife and that concubine went on giving birth to children all along being kept in the same house. No society would countenance this and no wife would tolerate this. Yet this is exactly what happened in this case if we are to believe that Khateman was a mere concubine. This treatment of Khateman continued even after Safiq's death, when Tanjina, the admitted wife, had free hand in the matter. (After considering direct evidence of marriage, the judgment proceeded.) This direct evidence of marriage is further corroborated by the evidence of opinion, as expressed by their conduct, of persons who were near relations of the family and had thus special means of knowledge of the relationship. These are P.Ws. 11 and 17. P.W. 11 is a big jotedar and is the son-in-law of Safiquddin and Taibunnessa. P.W. 17 is a pleader at Jalpaiguri. It is difficult to see why these respectable persons should perjure themselves to support the case of the plaintiffs.

26. There is not much evidence on the record as to the treatment accorded to her and her children by Safiquddin himself during his life-time. The only relevant evidence on the point is Ex. 23 Safiquddin's own note-book which contains entries showing that Saris of the same value were purchased for Tanjina and Khateman. Then there are the photographs of the family group (EX. 5 (b), (c), 6 (a)). Admittedly Safiquddin and his wife Tanjina are in these groups. The witnesses of the plaintiffs (P.WS. 10,19 and 20) identified a figure in the group as of Khatemannessa and certainly the position occupied by her in the group shows her to be a prominent member of the family. It is absurd to suggest that a concubine or a maid-servant could be allowed to occupy that position. It is highly improbable that Safiq and his admitted wife and other members of the family including grown up children will thus sit together Jor photography with a concubine of Safiq in their midst. It is still more improbable that such a photo will

be kept by the respectable relations of Safiq. The conduct evidenced by this of the family members including Safiq and Tanjina and those respectable relations who kept this group photo greatly go to show their own opinion of the relationship. These photos were proved in evidence on 15th August 1938. The defendants' witnesses were all examined after that date. But none of their witnesses including Kaichuddin (D.W. 31) and Ram Pada (examined on commission) ventured to deny that the figure pointed out as of Khatemannessa was really her. In our judgment the evidence adduced by the plaintiff to prove the factum of marriage is quite satisfactory. But over and above that the plaintiffs have in their favour also the presumption of law, semper prasumitur pro matrimonio. The burden of impeaching these rests heavily on the defendants.

27. As has been stated above, the defendants contended that the issue as to whether the plaintiffs were the heirs of Safiquddin was barred by the principles of res judicata, the Same having been decided in a previous suit namely, the Bent Suit No. 1 of 1922 (Ex. Z-27 and Z-27 (a)). Assuming that the issue was not so barred they sought to counteract the above evidence of marriage by relying on what they characterized as : (1) Khatemannessa's own admission on a previous occasion that she was not the married wife of Safiquddin and her sons were not the heirs of Safiquddin (Exs. W, W-1, W-2); (2) Opinion of Tanjina as to the non-existence of the relationship as expressed by her conduct (i) at the guardianship proceeding under Act 8 of 1890 wherein she asserted that she and her sons and the daughters of Taibunnessa were the only heirs of Safiquddin; (Ex. S), (ii) as also in the Khasmahal mutation proceeding (Ex. Z-25); (3) Opinion of the old officers of the family as to the non-existence of the relationship as expressed by their conduct in differently addressing Khateman and Tanjina, (Exs. Z-116, Z-81(b); (4) Opinion of other relations as to the non-existence of the relationship as expressed by their conduct in getting their names mutated in certain tea shares as also in getting the same partitioned, (Exs. Y-95, Y-149). They further relied on the evidence of some near relations of the family who deposed to deny (1) Khateman's ante nuptial relationship with Safiquddin, and (2) her marriage with Safiquddin. These are D. Ws. 31 and 18. We shall take up the plea of res judicata first. It cannot be disputed that a matter may be res judicata between co-defendants:

If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide the case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains : Cottingham v. Earl of Shrewesbury (1843) 3 Hare 627 at p. 628.

28. As was pointed out by the Judicial Committee in Munni Bibi v. Tirloki Nath in order that a decision may operate as res judicata between the co-defendants, three conditions must be fulfilled, namely, there must be : (1) a conflict of interest between the co-defendants; (2) the necessity to decide that conflict in order to give the plaintiff appropriate relief; and (3) a decision of the question between the co-defendants : see also Kishun Prasad v. Durga Prasad and Kedar Nath v. Ram Narain In Munni Bibi v. Tirloki Nath , M and K were the rival claimants to a house. M alleged that the house belonged to her deceased father Amarnath and that she inherited it from him. K alleged that the house belonged to her mother and that she inherited it. A creditor of Amarnath (M'S father) sued M and K to establish his right to sell the house as the property of Amarnath. Though K was made a defendant in this suit she did not appear and contest the claim. The Court found that the house belonged to

Amarnath and decreed the creditor's suit. K's son paid off the creditor and took possession of the house. M sued to recover possession of the house from K's son who claimed title under K.M. urged that the question of title as between her and K was res judicata by reason of the decision in the creditor's suit. The Judicial Committee held that the conditions of res judicata were established in this case. The fact that K had not entered appearance and contested the creditor's suit was held to be immaterial. It was observed that she was a proper party and had a right to be heard if she so desired.

29. In Maung Sein Done v. Ma Pan Nyun the intestate had left two daughters P and S and two sons. The sons took possession of his estate. Thereupon s filed a suit against her two brothers and her sister 'p' for administration of the estate and to recover her one-fourth share under Burmese Buddhist law. P filed no written statement, but gave evidence for her sister the plaintiff. The suit was dismissed on the ground that the succession was governed by the Chinese Customary Law under which the sons succeed to the exclusion of the daughter. Subsequently, p filed a suit for administration and to recover her one-fourth share. The Judicial Committee held that the suit was barred by res judicata as (1) there was a conflict of interest between P and her brothers, (2) that conflict would necessarily have to be decided to give relief she claimed, and (3) the question between P and her brothers was finally decided.

30. The principle laid down in Munni Bibi v. Tirloki Nath and Maung Sein Done v. Ma Pan Nyun was reiterated by the Judicial Committee again in Kedar Nath v. Ram Narain . In this case the right of judgment-creditor to bring the properties of a mutt to sale in execution of a money decree against the mahant of the mutt, which had for more than a quarter of a century been the subject of incessant litigation, was in question. Some of the properties were sold and the sale was set aside by the Subordinate Judge on the application of the judgment-debtor. There was an appeal by the judgment-creditor against this order. During the pendency of this appeal the judgment-creditor obtained an order that the auction purchasers should redeposit the purchase monies which they had been allowed to withdraw. Two of the auction purchasers thereupon, instituted two different suits in 1918 against K, the decree-holder and M, the mohant in possession of the mutt properties, for a declaration that they were not bound to redeposit the purchase monies on the grounds that the court sale was invalid and the mohant would not allow them to take possession of the properties they had purchased.

31. In the opinion of their Lordships of the Judicial Committee, in these suits it was clearly necessary to decide the dispute as to the validity of the court sale between K and M, then arrayed as co-defendants, for the purpose of giving plaintiffs appropriate relief. The mohant as defendant 2 sided with the then plaintiffs. The suits were ultimately decided by the High Court against the then plaintiffs, it having been held that the sale was valid and that the auction purchaser plaintiffs were bound to redeposit the money withdrawn by them. After this decision K proceeded to take possession of the properties purchased by himself but was opposed by the mohant. He thereupon instituted the present suit against the mohant and the suit once more raised the issue as to the validity of the sale of the mutt properties in execution of the decree. The Subordinate Judge held that this issue was not res judicata between the present plaintiff (decree-holder auction purchaser) and the present defendant (the mohant) because the then plaintiffs who are the auction purchasers of other properties at the court sale had not in their suits sought for any relief as against the mohant who was defendant 2 in those suits. Their Lordships seem not to have

approved of this conclusion and observed:

This ruling was given before the recent decisions of this Board as to res judicata between co-defendants....

32. Their Lordships later on observed:

In their Lordships' opinion it was necessary in those suits to decide the dispute between them as to the validity of the court sale for the purpose of giving the plaintiffs appropriate relief, and therefore this case is governed by the rule as to res judicata between co-defendants in Cottingham v. Earl of Shrewesbury (1843) 3 Hare 627, which has recently been applied by this Board in Munni Bibi v. Tirloki Nath and Maung Sein Done v. Ma Pan Nyun .

33. The doctrine of res judicata as between co-defendants must, however, be applied with great caution. Where the plaint itself in a prior suit did not raise any conflict between the co-defendants and a defendant did not appear, but a co-defendant appeared and claimed an interest conflicting with the interest of the absentee defendant, the decision, if any, on the point cannot operate as res judicata unless the absentee defendant gets notice of the conflict. In such circumstances the matter cannot be said to have been heard and finally decided so as to bind the parties. The basis of the principle of res judicata is best expressed in the maxim res judicata proveritate accipitur : 'A judicial decision is conclusive evidence inter partes of the matter decided.' A matter once formally decided is decided once for all.

That which has been delivered in judgment must be taken for established truth. For in all probability it is true in fact, and even if not, it is expedient that it should be held as true nonetheless expedit reipublicae ut sit finis Utium.

34. The respondents strongly relied on the decision in Mohan v. Ram Lakhmi Dassya : AIR1932Cal271 , to support the view that the decision in the rent suit No. 1 of 1922 did not operate as res judicata against them. In that case M and J were daughters of B by two different wives. G was brother of B. In 1904 J's mother M executed a deed of partition admitting that properties in suit belonged to B and G in equal shares. In 1917 J instituted a suit against G and M making R a forma defendant, alleging that G had no share in the properties that the deed of partition was fraudulent and collusive and that the same were not binding on her. G's defence in that suit was that he had an eight annas share in the properties and that the partition deed was valid and operative. R did not enter appearance as a party in that suit, but gave evidence as a witness supporting G's claim. The suit was decreed in J's favour the disputed land being declared as having been included in the estate of 'B' and deed of partition, as not binding on J. Therefore R instituted the present suit against J and the sons of G for her share in the property. The matter of consideration was whether the decision in the former suit was res judicata as regards the question of the title of 'G' in the properties in suit. Mukherjee and Guha JJ., held that the rule of res judicata on the footing of the parties having been co-defendants in the previous litigation did not apply to this case; but that

there could be no escape from the conclusion that the former suit was representative suit instituted by one presumptive reversioner, namely J and that R must be regarded as a person claiming under 'J' in the matter of the former suit and consequently the decision passed therein operated as res judicata between her as claiming under 'J'

and G's sons as claiming under 'G'.

35. In arriving at the conclusion that the rule of res judicata as between the co-defendants did not apply to this case the learned Judges after referring to the decision of the Judicial Committee in Munni Bibi v. Tirloki Nath observed as follows:

Their Lordships have approved of the dictum acted upon by the Courts in this country that to apply the doctrine of res judicata as between co-defendants three conditions are requisite : (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. This decision is also an authority for the proposition that if these conditions are fulfilled, the fact that the defendant who has a common cause with the plaintiff and who is a proper party to this suit does not enter appearance but chooses to stand by and let the plaintiff fight her battle does not stand in the way of the rule of res judicata applying as between him and his co-defendant who was in conflict with the plaintiff. It is clear therefore that if the plaintiff in the present suit had taken no part in the previous litigation but had left it to defendant 1 who was the plaintiff in that suit to fight it out with Govinda, and, for the matter of that, Govinda's sons, i.e., defendants 2 and 3 and the other defendants who are transferees from Govinda or his sons, would have been bound by the result of that litigation just as much as the plaintiff. The case however is different here because the plaintiff by the evidence that she gave in that litigation, supported Govinda and in that way repudiated the case which defendant 1, as plaintiff therein, sought to make out against Govinda. All that can be said, in view of the result of that litigation is that there should have been a conflict between the co-defendants, but it cannot be said that, in fact, there was any.

36. There is some difficulty in deducing the view as expressed in the last sentence quoted above from the decision of the Judicial Committee. These decisions do not require as a requisite condition that the co-defendants must have pleaded so as to raise the conflict of interest. It is not the conflict between the co-defendants in the previous litigation, but only their interest in that litigation being in conflict, which is required for the application of the bar. In our opinion, if the pleadings on record, no matter whether the co-defendants pleaded anything inter se or not, should raise the conflict of interest as between the different sets of the defendants, this requisite condition, namely that there must be a conflict of interest between the defendants concerned, shall be satisfied.

37. In the present case the decision which is set up as res judicata is the decision in the Rent Suit No. 1 of 1922. This suit was originally instituted against Safiquddin himself by his landlord Prasanna Deb Raikat. Safiquddin died during the pendency of the suit, and, as far as can be gathered from the materials on record, the present plaintiffs the present defendants 1 to 3 and Safiquddin's daughter by his first wife were substituted in his place as his heirs. Defendants 1 to 3 appeared and filed a written statement denying that the present plaintiffs were also the heirs of Safiquddin. But from the evidence on the record it appears to us that Khatemannessa was designedly kept from the knowledge of this conflict. Mr. Gupta contends that as the present plaintiffs were parties co-defendants in that suit and as admittedly the present defendant 1 Tanjina denied that the present plaintiffs were the heirs of Safiquddin (1) there was a conflict of interest between the then two sets of defendants (2) it was necessary to decide this conflict in order to give the then plaintiff the relief he claimed, and (3) the question was decided in that suit, no matter

on what materials that decision might have been based. Consequently, that decision, so long as it is allowed to stand, shall operate as res judieata, between the plaintiffs and defendants 1 to 3 or persons claiming under them. In our opinion, this will be a dangerous extension of the rule laid down by the Judicial Committee. The present plaintiffs were made parties as the heirs of Safiquddin. There was nothing on the record till then to give them any notice of any possible conflict. If they had no defence to put forward, and the result of that suit shows that they had done, they were not bound to put in useless appearance. If, therefore, behind their back anything was pleaded assailing their interest and if the then plaintiff thereupon chose to accept the relief as modified by such pleading, it is difficult to see how the matter can be said to have been heard and decided. The absentee co-defendants having no notice of the conflict and thus having no occasion for exercising their right of appearance and contest, the matter, so far as they are concerned, was not heard and decided by the Court. In our opinion, the decision is not res judicata and the plaintiffs are not debarred from agitating the matter in the present suit. The decision in that suit was by the agreement of the then plaintiff and the appearing co-defendants. In our opinion the correct view of the decision is as if the then plaintiff withdrew his claim as against the absentee defendants and by consent confined his relief only against the consenting defendants.

38. It should further be noticed that after this suit No. 1 of 1922, there were several other suits for arrears of rent for subsequent periods by the same plaintiff in which Khatemannessa was made party defendant as second widow of Safiquddin and her sons, the present plaintiffs 2 and 3, were made parties as sons of Safiquddin. In these suits Tanjina and her sons, the present defendants 1 to 3 were also made party defendants as other heirs of Safiquddin. All these suits were decreed against all these persons as heirs of Safiquddin and consequently, if the decision in suit No. 1 of 1922 could operate as res judicata, it is difficult to see why these later decisions should not also be res judicata. These being the later decisions will override the effect of the decision in Suit No. 1 of 1922 in this respect. Coming now to the evidence given by the defendants to impeach and counteract the direct evidence of marriage as also the strong presumption of marriage from the admitted conduct, we have the depositions of D.Ws. 18 and 31. (After considering the evidence of D.Ws. 31 and D.W. 18, the judgment proceeded.) The defendants relied on Ex. S as evidence of the opinion held by Tanjina herself as to the relationship of Khatemannessa with Safiquddin. Exhibit S is a petition by Tanjina Khatun under Act 8 of 1890 for being appointed guardian of her minor sons. Safiquddin died on 11th March 1924. This petition was filed on 9th September 1924. In this petition in para. 5 it was stated

that the minors have only a step sister named Safia Khatun, wife of Monlavi Ahmed Hussain, B.L., pleader of Jalpaiguri who is a resident in Jalpaiguri town and that the minors have no other near relations.

39. In Schedule A to this petition minors' share in the properties left by Safiquddin was given as 0-11-8 pies. This would be their share only on the supposition that Khatemannessa and her sons were not the heirs of Safiquddin. Tanjina is still alive and is available for examination as a witness. She has not been examined in this case. Consequently, these statements by her would be no evidence against the plaintiffs. Mr. Gupta seeks to bring in, not these statements by Tanjina but (1) her conduct in making this petition as expressive of her opinion as to the relationship and (2) the proceeding itself by which (a) the plaintiff's right was denied, and (b) the right of Tanjina and her sons was asserted.

40. In our judgment this conduct of Tanjina in applying for being appointed guardian of her minor sons treating them to be the heirs of Safiquddin in exclusion of the present plaintiffs, is not at all indicative of her opinion that Khatemannessa was not the legally married wife of Safiquddin. This conduct of her is not of such a tenor which cannot well be supported to have been willed without the inner existence of the opinion or belief that Khatemannessa was not so related. On the other hand, we have the positive evidence in her own account books (EX. 24) that she treated Khatemannessa and her sons on the footing of equality with, herself and her sons. Her conduct in the guardianship proceeding, in the mutation proceedings, in the mutation of names in the partition of the tea share as also in the rent suits 1 of 1922 and 15,16 and 17 of 1927-28, all rather go to show her consciousness that Khatemannessa and her sons were the heirs of Safiquddin. These are deliberate attempts at creating evidence against Khatemannessa and her sons, prompted, not by any opinion or by belief that they were not legally related to Safiquddin, but by the selfish interest. In our opinion neither Ex. S nor Ex. Z-25 can be used as evidence against the plaintiffs. In any case they are of very little evidentiary value and we do not consider them of any weight so as to counteract either the direct evidence of marriage or the presumption of marriage arising from the admitted course of conduct.

41. As regards these proceedings being evidence under Section 13, Evidence Act, it is not in evidence that these assertions or denials were ever made to the knowledge of the plaintiffs. Assuming that these can be treated as assertions or denials within the meaning of Section 13 even without such knowledge we are not prepared to attach any evidentiary value to such ex parte assertions and denials. In our opinion Ex. Y-95, Ex. 149 and the connected proceedings are equally not expressive of any opinion as to the relationship and are not of any weight to weigh against the direct evidence of the marriage as also the strong presumption arising from the long course of conduct. Further, some of the parties to these proceedings were examined in this case as the witness of the plaintiffs to prove the marriage itself and the defendants made no attempt to confront them with their alleged opinion as expressed by their conduct in these proceedings. (After considering the alleged admissions by Khatemannessa the judgment proceeded.) Mr. Gupta last of all contends that even if the plaintiffs be the heirs of Safiquddin as alleged by them, they cannot be allowed to succeed in their claim without at the same time being made liable to pay the debts for which the properties were sold. Mr. Gupta contends that Safiquddin left certain debts. In order to pay off these debts Tanjina and her sons had to raise loans by mortgaging the properties left by Safiquddin. The properties were ultimately sold in execution of decrees obtained by the creditors in respect of these mortgages and were purchased by the present defendants. Consequently, if the plaintiffs claim the properties from these purchasers as heirs of Safiquddin, they must be made to pay their share of the debt.

42. In support of this contention Mr. Grupta relies on Hamir Singh v. Mt. Zakia ('75) 1 All. 57 (F.B.) and Begum v. Amir Mahammad ('85) 7 All. 822. In order to establish that Safiquddin left debts and that Tanjina paid these debts out of the loan raised by her, Mr. Gupta relies on the documents Exs. S, S (6), S (13), Z (2) series, Ex. T and on the evidence of D.Ws. 8, 12 and 27. Dr. Sen Gupta appearing for the plaintiffs-respondents contends (1) that the defendants should not be allowed to make this case as it involves questions of fact and was not made in their pleadings at all; (2) that the evidence on record is not and cannot be the whole evidence on the point inasmuch as no issue regarding it was raised and consequently no evidence could be directed to

the same; (3) that there is nothing on the record to show the funds left by Safiquddin and the income of the estate left by him so as to enable the Court to see if the alleged debts of Safiquddin (a) could not be or (b) as a matter of fact, was not, paid out of such fund or income; (4) that even the partial evidence that has incidentally come on the record goes to show that the alleged debts were paid out of the income of the estate; (5) that in the facts and circumstances of the present case the principle underlying the decision relied on by the appellants does not apply and that no liability can be fixed on the plaintiffs in this respect.

43. Admittedly the defendants did not make any such case in their written statements and therefore no issue could be raised on the point at the trial of the suit. It cannot, therefore, be denied that whatever evidence there may be on the record relevant to an inquiry about the matter, these must have come only incidentally and the plaintiffs are fully justified in characterising the same as incomplete and incomprehensive. It is not possible for a Court of law to come to any conclusion on any question of fact sought to be established by such evidence. It appears that during argument before the trial Court the question was sought to be raised by the defendants. The learned Subordinate Judge in his judgment dealt with the matter thus:

In any case this small debt of Rs. 10,000 could be met by the earnings from the vast properties left by him. It is in evidence that in 1925, dividend of Rs. 3000 was got from the shares in Sukna Tea Co. alone. The loans of Rs. 16,000 and Rs. 12,000 in quick succession shortly after the death of Safiquddin were not at all necessary except for Tanjina's luxuries and for filling the pockets of her officers and Ammuktears Rampada and Abdul Majid. From the circumstances and evidence we are inclined to accept the contention of the learned advocate for the plaintiff and hold that the plaintiffs will not be saddled with any liabilities on this head. We hold that Safiq's debts could be paid and were paid by the earnings of the properties.

44. It is difficult to find fault with this judgment. All that we can say is that the learned Judge could have disposed of the matter on the simple ground that the same was not covered by the pleadings and there was no reason why at that late stage the defendants should be allowed to make a new case involving matters of evidence. The cases relied on by the appellant are all cases where the heir in possession purported to act on behalf of all the heirs. Thus in Hamir Singh v. Mt. Zakia ('75) 1 All. 57 (F.B.), the creditors of a deceased Mahomedan obtained decrees against his two widows as his heiresses and the widows executed sale deeds for themselves and for a minor daughter of their co-widow in the assumed character of her guardian, It was held that this sale did not affect the minors' share in the property but that

it was only equitable to require that the recovery of her share should be contingent on the payment by her of her share of the debts, for the satisfaction of which the sale was effected.

45. Similarly, in Begum v. Amir Mahammad ('85) 7 All. 822, the decree was obtained by the creditors of the deceased against only the heirs in possession and the property was sold in execution of this decree. It was held by the Pull Bench that the sale did not affect the shares of the absentee heirs, but that such absentee was not entitled to recover from the auction purchaser possession of his share in the property without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debt for which the decree was passed and in satisfaction whereof the sale took place. This liability was held not to depend upon

any rule peculiar to the Mahomedan law, but upon the general principle of equity. Evidently in the facts and circumstances of this case Tanjina and her sons could not have claimed any such equity in their favour without rendering accounts as to the income of the estate coming to Tanjina's hands. The question is whether any equity exists in favour of the auction purchasers independent of the equity in favour of Tanjina. This is not a case where the visible state of things did in any way mislead the creditors or the auction purchasers. The plaintiffs, the left out heirs, were not absentees from the estate but were in joint possession of the property and in actual enjoyment thereof. The visible state of things was therefore clearly in their favour. If, in spite of this, any of the co-heirs succeeded in inducing any creditor to accept him or her as the sole heir and thus to transact with him or her alone, there is no reason why the left out heir should be placed in relation to such creditor or auction purchaser in a position worse than that in relation to the intermeddling heir. If the contesting defendants were innocent and were not to blame for what happened, the plaintiffs were equally innocent who were equally lulled to a sense of complete security by being allowed to remain in undisturbed enjoyment of their right in full. In these circumstances it will not be equitable to make them pay when Tanjina herself could not have claimed that equity in her favour.

46. F.A. No. 34 of 1939 is by defendants 17 and 18 and relate only to the question of cost. No doubt the plaintiffs' claim against these defendants failed, because these defendants were interested only in those items of property that were sold in execution of decrees made in suits in which the 'plaintiffs were also made defendants as heirs of Safiquddin. Instead of relying on this simple ground, however, these defendants in their written statements, chose to assail the plaintiff's title as heirs of Safiquddin. They denied that Khatemannessa was the legally married wife of Safiq and that plaintiffs 2 and 3 were the sons of Safiq. Admittedly this pleading raised an issue, the trial of which involved practically the whole of the costs incurred by the plaintiffs. The plaintiffs succeeded on this issue and we see no reason why the defendants who thus put the plaintiffs to this costs should not be made to pay the same. In our opinion, the learned Subordinate Judge did not commit any error in the exercise of his discretion in this respect. In the result both the appeals fail and are dismissed with costs. There will be only one hearing fee in both the appeals which we assess at thirty gold mohurs.

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