

*Special Appeal No. 302 of 1863.*1864.
April 25.

SAIYAD WALI'ULLA' *Appellant.*
 MIRA'N SA'HEB, SON OF ABDU'L RAHI'M,
 deceased *Respondent.*

*Muhammadan Law — Parentage — Acknowledgment — Inheritance—
 Concubines—Slave Girls—Marriage—Presumption.*

Held that the son of a Muhammadan by a slave girl, if acknowledged by his father, is entitled to the same share as the son of a lawful wife.

The acknowledgment of a son by a Muhammadan need not be a formal acknowledgment; if it can be made out from his acts and conduct, it will be sufficient.

THIS was a special appeal from the decision of A. B. Warden, Judge of the Súrat District, reversing, in appeal, the decree of the Principal Şadr Amín of Súrat.

The appellant, Saiyad Walíullá, brought the original suit; representing that the defendant, Abdúl, was his half-brother; that they were both the sons of Saiyad Abdúl Rasúl, deceased, the Kází of Ránder; that Abdúl had, on their father's death, taken possession of the whole of his estate, real and personal, and refused to give him, Saiyad Walí, any share therein. He, therefore, sought to recover his half-share, which he estimated at Rs. 39,122.

The defendant, Abdúl, by his answer, contended that the appellant was not the legitimate son of the defendant's father, and that the appellant's mother had not contracted nikáh with him; that she was originally married by the ceremony of nikáh to one Bajiniá; that afterwards, on a quarrel between her and the said Bajiniá, she came to Ránder to the defendant's father, representing that she was starving, whereupon she was retained as a domestic; that thereafter she was delivered of a child, the present appellant, she having been pregnant at the time she was taken in by the defendant's father; that the appellant, therefore, was not his son, and had no claim to share in the property in question; and that the claim was barred by lapse of time.

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The Principal Şadr Amín found that the claim was not barred; that the plaintiff's assertion, that the deceased Abdúl Rasúl had purchased his mother, Latífá, and contracted nikáh with her, was proved: whereas the defendant's witnesses to the contrary were not worthy of credit; that in the certificate of the plaintiff's marriage, proved by the Kází's Náib or deputy, it appeared that the plaintiff was the son of the deceased Saiyad Abdúl, who himself was Kází; that the parties to this action had submitted certain disputes for settlement to arbitration, and in the deed of submission, to which the defendant was a party, the plaintiff described himself, in signing it, as the son of the deceased Saiyad Abdúl, to which the defendant took no exception; that in the award of the arbitrators the parties were described as the sons of the said Abdúl; that the same facts appeared from other documents to which the defendant or his son, the present respondent, were shown to be privy. He, therefore, gave judgment for the plaintiff: awarding him a half-share in all the property proved to have been derived from the deceased Saiyad Abdúl.

The Judge, in appeal, recorded the following judgment:—

“ The points for decision are: first, whether the claim is barred by the statute of limitations; secondly, whether the respondent, Walíullá, is the legitimate son of Abdúl Rasúl; thirdly, if an illegitimate son, is he, by right of inheritance, entitled to half, or any portion, of the ancestral property, which he lays claim to.

“ With reference to the first point, the Court holds that the claim is not barred by the statute of limitations: for it is admitted by both parties that they lived together; and the respondent, Walíullá, received an allowance from the appellant, Abdúl Rahím, for his support, up to within two or three years of the institution of the suit; therefore, the cause of action, properly speaking, only arose when the appellant Abdúl Rahím, stopped the allowance which he had been in the habit of allowing to the respondent, Walíullá.

“ With reference to the second point, the Court holds that

the respondent Walfullá's legitimacy is not proved. The oral evidence adduced to prove that his mother contracted nikáh with his father is very unsatisfactory, and not to be depended upon. * * * In Macnaghten's Principles of Muhammadan Law, p. 132 (a), it is laid down that if a man acknowledges any child as his, and after his death his widow likewise acknowledges the parentage, then the child is to be considered a legal heir; but there is nothing to prove that the deceased Abdúl Rasúl ever acknowledged the respondent, Walfullá, as his son.

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"With reference to the third point, the Court is of opinion that the respondent, Walfullá, having borne the name of his reputed father, and having had an allowance made him out of the estate by the appellant, Abdúl Rahím, it would seem that he is an illegitimate son of Abdúl Rasúl; but, never having been acknowledged by him as his son, he cannot claim any part of the estate by right of inheritance. The Court, under the above circumstances, reverses the decree of the lower court, and throws out the claim of the respondent, with costs."

The case was heard before **COUCH** and **TUCKER, JJ.**

Reid, Shántarám Náráyan, and Dádábháí Frámji for the special appellant.

Dhirajlál Mathurádás for the special respondent.

COUCH, J. :—There is evidence in the case that the appellant was treated by the deceased Abdúl Rasúl as his son. In the first place, there is the memorandum No. 10, in which the appellant is described as of the same family as the deceased Abdúl Rasúl, and is called by the family name, "Rafáí;" and the respondent has admitted, in the course of this suit, that it is in the handwriting of his father. The explanation given on this point by the respondent's pleader is by no means satisfactory. Secondly, there are the facts of the appellant's marriage having been effected by the deceased, and the marriage certificate, of which it cannot be supposed

(a) The pages are those of the Madras edition of 1860, by Mr. Sloan.

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the deceased Abdúl Rasúl was ignorant. Thirdly, the conduct of the deceased respondent himself leads us to the conclusion, that he must have been aware that both he and the appellant were the sons of the deceased Abdúl Rasúl. The reference to arbitration was signed by the deceased respondent himself; and there is also the agreement written by the present respondent by the authority of his father, in which the appellant is described as the son, and the respondent as the legitimate son, of the deceased Abdúl Rasúl.

The respondent's answer also throws some light on the subject; for it is contended therein that he is not a legitimate son; and the story set up to account for continued maintenance being supplied to the appellant and his mother is, to say the least of it, exceedingly improbable.

We take the Judge's finding to mean that the deceased Abdúl Rasúl never made a formal acknowledgment of the appellant as his son.

In Macnaghten's Muhammadan Law (page 323, Case VII.) it is said, in answer to the question, whether the issue of concubines who were slave girls can inherit the property of their father on his death: "If the concubine were the property of the father, and either she or her mother had been made captive in an infidel country, and had been duly subjected to slavery, the connection without marriage is legal, and the parentage of her offspring would vest in the father, if he claimed them, and after his death they would be entitled to a portion of inheritance. But if she had not been duly subjected to slavery by being made captive in an infidel country as above described, such concubine is not a slave in the legal sense of the term, and connexion with her is unlawful without marriage; nor will the parentage of her offspring be established in the father, because it is a requisite condition in the establishment of parentage that there should be a consort; and consorts are either principal or inferior. A wife is of the first description, the parentage of whose offspring is established in the husband, independently of any claim on his part, and cannot be disavowed by his denial.

A slave is of the other description, the parentage of whose offspring is not established in the father without claim. The right of inheritance depends on the establishment of parentage.

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Now if this woman were not a slave in the legal sense of the term, there is evidence of marriage having taken place. Dr. *Lushington*, in delivering the judgment of the Privy Council in the case of *Khajah Hidayat Oolla v. Rai Jam Khanum (b)*, says: "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 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." But if she were a slave, then the appellant must be taken to be the son of Abdúl Rasúl by her. Indeed, the deceased respondent and the respondent now before the court have acknowledged him to be such; and have merely set up the plea of illegitimacy as a bar to his right to inherit.

In *Macnaghten*, page 85, it is laid down that "all the children of a person deceased, whether they are the offspring of a slave girl or a free married woman, are, without distinction, entitled to succeed to their respective shares according to the law of inheritance; "and at page 95, Case XVII., is this passage:—"If the wife died before her husband he was entitled to one fourth of her property, both real and personal, and his legal share of it, according to law, must be distributed among his children, whether by the wife or slave girls:" clearly showing that where the parentage is established, sons of wives or of slave girls are equally entitled to inherit their father's estate.

With respect to the doctrine of acknowledgment, there is the following passage at page 61 of the same work:—"If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such re-

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lation should exist between them, the parentage will be established."

In the Bengal Şadr Divání Reports of 1801, at page 48, a case is reported in which it was ruled that the plaintiff, the son of a slave, and the defendant, the son of a married woman, were equally entitled to inherit; and in the 2nd of Borrodaile's Reports, there is an exposition of Muhammadan law, which bears out the above view. The Muhammadan law officers were asked: whether the illegitimate son of a person deceased, who left two legitimate daughters, would be entitled to a share of the family watan, as well as the daughters, or not; and, if he were entitled to a share, to what proportion of the whole. They answered: "The Muhammadan law neither recognises nor mentions such property as watan. All property, whether watan or not, must be classed under the term 'tarikát,' which means 'effects left by a person deceased.' This property must be divided among the heirs according to the law of God. The question states that the deceased left two legitimate daughters and one illegitimate son. By the law of God, a son is to receive a share double that of a daughter; wherefore, in this case, the property being divided into four shares, the son shall receive two shares, and the daughters one share each." (c)

In these cases the doctrine laid down by Macnaghten was clearly acted upon, that is to say, the son of a slave girl acknowledged by his father was held to be entitled to the same share as the son of a lawful wife.

In either case, therefore, the appellant is entitled to share in the inheritance of Abdúl; and we must order that the decree of the Judge be reversed, and the decree of the Principal Şadr Amín will stand.

Appeal allowed.