Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Wise and others v. *Sunduloonissa Chowdranee and others, from the late Court of Sudder Dewanny Adawlut of Calcutta; delivered 25th February*, 1867.

Present:

Sir James W. Colvile.
Sir Edward Vaughan Williams.
Sir Richard Torin Kindersley.

Sir Lawrence Peel.

THIS case comes before their Lordships as an *ex parte* Appeal, brought by Mr. J. P. Wise and Juggunath Roy Chowdry, two only of the original Plaintiffs, from a Decree of the late Court, the Sudder Dewanny Adawlut of Calcutta, which reversed a Decree of the Civil Court of Dacca in favour of the Plaintiffs.

The original Plaintiffs in the suit were Deenomoney, suing in her own right as a widow of a Mahomedan Zemindar named Aklakoollah, and as mother and guardian of her minor son Fyzoollah, to establish their respective rights, as such, to the succession of Aklakoollah and the Appellants. Deenomoney died pending the suit, which was continued, on behalf of Fyzoollah, by one Mamtazooder Chowdry, as his guardian. The Appellant Wise claims to be the assignee of the whole of Deenomoney's share, and of a portion of her son's share, under conveyances from her; and the other Appellant claims to be assignee of a portion of Deenomoney's share, under a conveyance from Wise, and of a further portion of the minor's share under a conveyance from Deenomoney.

The Defendants were Sunduloonissa Beebee, widow of Aklakoollah, Olioollah Chowdry, his son, and Meer Saadut Ally, the husband of a deceased daughter of Aklakoollah, who survived him, and was entitled to share in his estate.

The object of the suit was to establish the marriage of Deenomoney with Aklakoollah, and the parentage and legitimacy of her son Fyzoollah, as a son and heir of Aklakoollah; and consequently the titles of both to succeed to Aklakoollah, the widow to her share, and her son as a residuary and heir of Aklakoollah.

The suits could have no operation in any question which might hereafter arise as to the effect of Deenomoney's conveyance of part of her son's property, between him and both, or either, of the co-Plaintiffs, Wise and Juggunath.

The cause was decided by the Judge of the Civil Court at Dacca, a Mahomedan, in favour of the marriage of Deenomoney, and of the legitimacy of Fyzoollah; but this decision was reversed by the Sudder on Appeal, and from that last Decree the two Plaintiffs, Wise and Juggunath, alone appeal, Deenomoney having died previously to the institution of the Appeal. Fyzoollah not joining in the appeal, is named by the Appellants as a Respondent.

Their Lordships in this as in other *ex parte* cases from India are placed in a position of embarrassment and difficulty. It is not explained why Sunduloonissa, who is in possession of the estate, which is large, does not appear to support the Decree in her favour. It is possible that had the case of the Respondents been argued before their Lordships, some view of it, amidst the conflict of evidence and the opposing presumptions which arise from the evidence, might have been offered to their Lordships' attention which has escaped their own careful and anxious consideration of the evidence and Judgments. The Counsel for the Appellants, Sir Roundell Palmer and Mr. Leith, have argued the case with great candour and completeness. The whole evidence on both sides has been fully presented by them to the attention of their Lordships; but still in such a case there is room for much anxiety and hesitation. The Appellants ought not, however, to suffer by reason of this natural hesitation in a tribunal about the correctness of its judg-

ment, induced by an omission of the opposite party, nor ought the absence of the latter from the arena to weaken the presumption in favour of a Judgment which is given on their side. The *onus* must still lie on the Appellants to show manifest error in the Decree appealed from.

The pleadings in this case require attention. The Plaint assigns a date to the marriage, and treats the marriage as having taken place at the time when Deenomoney's intercourse commenced, or a few days after; but in a subsequent portion of her Plaint Deenomoney states the celebration of the seventh month of her pregnancy, and the celebration of the birth of Fyzoollah, circumstances which if truly alleged and proved would suffice to prove her marriage and the legitimacy of her son. Consequently, on the Plaint as framed, the Plaintiffs would be entitled to recover if this latter portion of the Plaint were credited by the Court, and the allegations as to the ceremony and its time disbelieved. The Plaint alleges, by anticipation, that Sunduloonissa caused a will to be forged after her husband's death, and enters into arguments to prove that it was forged. The answer of Sunduloonissa sets up that will, and asserts it to be genuine, and relies upon it. In that will are contained a reference to and acknowledgment by the testator Aklakoollah of a Kabin, executed by him on his marriage with Sunduloonissa, which, if it were established, would show a prior title in her to the Zemindary, by conveyance on good consideration at her marriage, and so overrule entirely the claim of a second wife and her son; whereas a will simply would be inoperative, even as to a third, without their assent. Sunduloonissa in her answer relies also on a Kabooleut executed to her by Deenomoney, for a certain part of the estate, which is, if genuine, an acknowledgment of Sunduloonissa's title by Deenomoney.

These documents are alleged by Deenomoney to be forgeries.

The issues, which are stated at page 32 of the Record, embrace all these questions; the marriage of Deenomoney, the parentage of her son Fyzoollah, his legitimation, and the genuineness of the will.

The pleadings in this case, as it has been observed, state the case of each party fully. Nothing comes

out in the evidence on the main points in the cause of which some mention is not made in the respective pleadings of the parties.

The case alleged by Deenomoney is that she was married by a nicka marriage to Aklahoollah at the time of her first consorting with him. She gives the date of the marriage in her Plaint. Her case, therefore, as stated by her, excludes the supposition that Aklahoollah raised her to the status of wife subsequently on her proving pregnant with a son which he acknowledged to be his. Still the case may be, that she was acknowledged directly or by implication as a nicka wife at some subsequent period of the cohabitation. In a native case it is not uncommon to find a true case placed on a false foundation, and supported in part by false evidence. It not unfrequently happens that each case, that of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it, by fabrications of evidence and subornation or tutoring of witnesses; and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found. The subsequent allegations in the Plaint as to the celebration of the seventh month of her pregnancy, and the celebration of the birth of her son, suffice to let in this proof of marriage also.

The Plaint does not disclose the history of Deenomoney previously to her introduction into the house of Aklakoollah. But the answer of Sunduloonissa supplies that omission. The evidence on each side supports the general account about Deenomoney, which the answer of Sunduloonissa contains in the 15th page of the Record, in the 6th paragraph, viz., that she was a singing girl, and that she attracted the fancy of Aklakoollah, who brought her to and maintained her in his house. It is said, in the statement of Sunduloonissa, that Deenomoney was brought there whilst still very young. There is no evidence that her life had before then been licentious. The imputation then on her character at this time, which is found in the answer, seems to be founded on her profession of a public native songstress; and though this is not a profession in India which is followed by women of character, it is by no means a reasonable presumption that a very young girl, a member of such a

company, should be in her early years grossly profligate. This, however, is what the answer of Sunduloonissa insinuates as to Deenomoney, even at this early age, for she says of her that "instead of leaving off her former vicious habits, she continued to indulge her vicious passions;" and then she imputes to her four paramours in succession, to one of whom, Shumfutoollal Sirdar, she ascribes the parentage of Fyzoollah.

In viewing the evidence given in this case, it will be important to bear in mind that many of the witnesses for the Defendants support these allegations in the answer by evidence as inconsistent as the answer itself, by imputing to Deenomoney the utmost continuing profligacy of conduct in this respect, so little likely to be condoned by a man of a race prone to jealousy and to the seclusion of their women, and yet not accounting for her continued abode in the zenana. Thus she is represented as very profligate at a very early age, as continuing to be very profligate during her whole cohabitation in the zenana of Aklakoollah, intriguing with various men, openly, without disguise, and to the knowledge of a hostile wife; and yet as continuing in the zenana, preserving her status there unimpaired, whatever it was, and treated with outward demonstrations of respect. And what is not a little singular in the alleged life of this woman, to whom such early, such long-continued profligacy is imputed, is, that after the death of Aklakoollah there is no evidence of any profligate life whatever, and she is found to be for a time received as an inmate in the house of a respectable Mussulman on the footing which she ascribes to herself of widow. All this story, therefore, of her previous and continuing profligacy is found on an examination of it inconsistent and incoherent; it does not cohere, and it is not consistent with any of the ordinary presumptions which would be formed on such an intercourse with the master of a native house in that rank of life.

Some of the witnesses describe her as being in the zenana not for the ordinary purpose of such an introduction, but simply to divert Aklakoollah with her songs; others say that she was there for the ordinary purpose; Sunduloonissa says she was there as a slave girl, of which there is no proof or likelihood. She does not expressly deny the existence

at one time of sexual intercourse between Aklakoollah and Deenomoney; but her answer puts forth that subsequent case of alleged impotency in Aklakoollah, to which many of the witnesses, including two native doctors, depose.

The testimony of these doctors, on examination of it, proves to be utterly worthless and inconclusive in a medical point of view, even supposing that any dependence could be placed on its truth.

For what purpose is this worthless evidence produced? It is to prove that Aklakoollah could not possibly be the father of Fyzoolah; but it proves also that he could not possibly suppose himself to be the father of the boy.

If the story were true which the answer sets up on this point, it is inconceivable that Aklakoollah should believe himself to be the father of this child; for the story is, that he had become, some years before its birth, incurably unable, to his own knowledge, of having any sexual intercourse; that the knowledge of his complaint and its consequences was general in the house: and yet this very man, in this state, who had a legitimate son and daughter, is supposed to be keeping in his zenana a woman who was conducting herself with open proflicacy with menial servants, discovered and yet not dismissed. What reason does the answer of Sunduloonissa give for such a toleration of offences, generally so little likely to be pardoned by a Mussulman? She says, "The truth is, that for her bad character he ordered her to be put out of the house, but kept her there at the request of other parties." No further explanation is given; that given of so startling an improbability is, by reason of its generality, and the entire absence of evidence to support it, unworthy of any credit. Consequently the attempt has been made, and has wholly failed, to render this marriage improbable by reason of the turpitude of the alleged wife. The improbability is reduced to this: that he married a female by a nicka marriage whom he might probably have obtained on easier terms as an inmate of his zenana. The failure of this attempt and of this evidence to blast the character of the rival claimant as wife certainly tends to strengthen the case that she sets up.

There is no other intrinsic improbability, then, in

this story of his having married, by a nicka marriage, a girl of this profession, than that which attaches to it as a disreputable connexion with one who probably would have made no difficulty about entering his zenana on easier terms.

This is an improbability not of a light character, and the evidence to support it ought to be evidence probable in itself and free from suspicion. The burthen of the proof was of course on the Plaintiffs. It is impossible for their Lordships to form any opinion on the credit due to witnesses by reason of their status and apparent claims to be trusted, which is at all worthy to be compared to that which is formed by a Judge fit for his office, who sees them, hears them, and probably knows something of their antecedents. This cause between Mahometans was tried before a Mahometan Judge. Of the probability of the acts imputed to a Mohametan Zemindar he is a more competent judge than either the European Judge of the Sudder Court or their Lordships can be. His judgment seems to have been carefully formed, and his observations upon the witnesses are entitled to a respectful consideration. Had their Lordships found that his observations upon the witnesses themselves were opposed to the opinion of the Sudder Court upon the credit due to those witnesses, irrespective of the probabilities of the case, they must necessarily have compared the conflicting opinions, and the result might have been a conclusion that the case must be decided, in a conflict of testimony nearly balanced, by the preponderance of probabilities. But if there be found, even in a native case, positive credible testimony unimpeached, and credited by a Judge competent to judge of the credit due to witnesses, it would seem to be equivalent to a total disregard of native testimony, to say, despite of this positive testimony we will put all evidence aside and act alone on the probabilities of the stories and the inference from the conduct of the parties.

When the cause came by appeal before the Judges of the Sudder Court, they, unfortunately, instead of reviewing the whole case and expressing their opinion upon all the points on which the Court below had based its conclusions, which were conclusions of fact, narrowed their inquiry to the simple

question whether the Plaintiff Deenomoney had proved her marriage. Now the Judge below, in dealing with that question, had brought and properly brought to the consideration of it, certain inferences from the conduct of Sunduloonissa, which he judged corroborative to some extent of the truth of the Plaintiff's story. These were inferences which he drew from the fabrication of documents set up by the Defendants, and which the Plaintiffs alleged to be forged, viz., an alleged will, a cabooleut, and certain receipts, which they, the Plaintiffs, alleged to have been fabricated to defeat a claim which the Defendants dreaded. The argument for the Plaintiffs was this: Unless Deenomoney's claims and that of her son were judged to be formidable, why this fabrication of documents? The answer given below was, the documents are genuine. The Judge below found that they were forged. Their bearing on the issue as to the marriage was direct and important. Yet the Court of Error dismissed entirely from their consideration the question of the genuineness of those documents.

Again, the Judge below had believed the witnesses for the Plaintiffs who deposed to the marriage of Deenomoney and the legitimacy of the son Fyzoollah. The Sudder Court did not examine at all into his reasons for believing the evidence. So far from saying that the evidence for the Defendants was more weighty, they attached but little weight to it; but they decided against and reversed the finding of the Judge below, merely on inferences from the conduct of Aklakoollah and from that of Deenmooney herself. Though they appear to have been mistaken in calling Deenomoney a Hindu, who, according even to some evidence of the Defendants, had conformed to Mahometan usages, they say, and say truly, that the marriage was an improbable occurrence; but though improbable it was certainly capable of being proved by direct and credible testimony, as to the value of which they forbore from inquiring. What were the inferences on which they acted? The first is that Aklakoollah took no steps in his lifetime to make a public official declaration of any kind of his nicka marriage, and of the legitimation of his child. This child was little more than three years old when

Aklakoollah died. He died suddenly, of a suddenly contracted disease, cholera; and no inference against the marriage can reasonably be drawn from such light data. With respect to Deenomoney's own conduct, her non-opposition to the mutation of names on the production of the will is mainly relied on. But it is to be observed that a few months only elapsed between the death of Aklakoollah and this act; that knowledge of it is not brought home to Deenomoney, and that it would be too much to presume her, a native lady whose very status was disputed, and without means, armed at all points with means of knowledge, and pecuniary means, and friends able to assist her then. There is the less reason for making this presumption in the present case, that it plainly appears that Mr. Mackillup, the Magistrate, who inquired into the circumstances and heard the evidence as to the alleged imprisonment of her, and the duress practised on her, did believe the story, and attributed the withdrawal of her charge to some influence exercised upon her. His view of the case gives an air of probability to her version of her conduct on this occasion. These presumptions, then, seem to their Lordships too feeble to overpower, or materially to weaken, the evidence in proof of her marriage and legitimacy on which the Judge below acted; and as the Sudder Court went not at all into the consideration of the evidence for the marriage and legitimation, and opposed only insufficient inferences to it, the weight of the opinion of the Judge below on these facts stands really unshaken.

The answer, it has been shown, sets up a will; it also alleged that Deenomoney accepted a pottah of certain land, and gave a cabooleut to the Defendant, and took certain receipts. These were all found by the Judge below to be fabricated documents. The Sudder Court expressed no opinion about them; and it remains for their Lordships now to do, unaided by any Judgment of the Sudder, that which they would have been better able to do if assisted by such Judgment, viz., to examine the grounds which the Court below had for such conclusion. Their Lordships conceive that if in this case the Defendants are found fabricating documents, and getting up false testimony to meet the case alleged, the reasonable conclusion is that it

must have appeared at least a formidable case. But if it were, *primâ facie*, a formidable case, then a considerable part of the oral proof of the Defendants must be false; for where would be the risk of meeting in a Court of Justice a claim of this nature, raised by a profligate woman, living an abandoned life in the house of her keeper, intriguing with his menial servants to his knowledge, and threatened by him for it with expulsion, bearing a child to one of his menial servants, and confessing to several her shame, and the real paternity; never married, nor so reputed to be, and her child never even reputed to be the son of her master, notoriously and by his own confession impotent at the time of its conception, before, and continually after. If such a woman should have had the strange audacity to prefer so desperate a case before a Court of Justice, who would be found to espouse it?

The fabrication of the documents, then, supposes a formidable case at least, and a great part of the oral evidence presents one hopeless and desperate. A native, even with an honest case, or his advisers, may fabricate evidence to meet a case which they fear, though they know it to be groundless; and if this woman and her child stood in an ambiguous relation to the deceased, and the real heir feared that a Court would draw in favour of marriage and legitimacy really groundless conclusions, from a plausible appearance of marriage and legitimization, the fabrication might, however wicked, not be fatal to a defence; but in this case the Defendant's oral evidence presents a desperate and hopeless case as the real case of the claimants. If, then, the fabrication be established, proof of that fabrication supports the Plaintiff's case to some extent; for it lays a foundation for and supports the evidence of those apparently respectable witnesses for the Plaintiff, who say that the deceased treated Deenomoney as his nicka wife, so called her, and treated her child Fyzoollah as his own; and these acts would suffice to prove both marriage and legitimacy, even if the Court refused to believe, or hesitated to believe, the direct testimony as to the ceremony.

Their Lordships have therefore directed their attention, in the first instance, to that part of the Judgment in the Court below which treats these

documents as fabricated. Their Lordships regret to say that they have no hesitation on this part of the case; that they agree entirely in opinion with the Judge below, who pronounced them forgeries. The cabooleut, when it is viewed in conjunction with the evidence which accounts for its being given, destroys itself. Deenomoney is described on the face of it as the widow of Rajub, the man to whom she is said to have been contracted, and for whose dwelling-place she was about to build a house on the ground included in the lease. The receipts of course fall with it. The full recitals in all three of the title of the Defendant explains the motives for their fabrication and the date of them shows the most incredible degree of inconsistency in the conduct of Deenomoney, admitting and opposing about the same time the title of her opponents. The will also is surrounded with suspicion, which its internal evidence tends to confirm. It sets up a kabin, never produced, and the non-existence of which, if it ever existed, is wholly unaccounted for. This will is not likely to have been executed by the deceased in favour of his wife with whom he had been at variance. The extract from the criminal register shows that such was the case. If her claim under the kabin had been real, it would most probably have been produced as a check upon her husband during their active warfare; she represents her husband as merely her surberakar; and if that were so, he must have been acting fraudulently in mortgaging her property. His management is not interfered with, even after he had, in his lifetime, suffered her trust property to be taken in execution for a debt of his own. This appears from the Judgment of the Court in the mortgage suit. Taking all these circumstances together, the Court rightly judged the will to be fabricated; and the observations of the Judge on the factum are most weighty. Turning, then, with this assistance to the examination of the positive testimony, this portion of it, at least, may be trusted which shows the woman and her child to be, the woman cohabited with, at least, and the child of the woman acknowledged and declared to be the legitimate child of the father; and this acknowledgment made in words which import a precedent nicka marriage. There appears to their Lordships to be no ground

for distrusting the evidence on which the Judge below relies, of the witnesses Surenloollah and Juggonath Gooho; who, though they were not present at the nicka, nevertheless both speak to acknowledgment of parentage and acknowledgment of nicka. Without going the length of saying that the acknowledgment of a son as legitimate who might be a legitimate son of his acknowledger necessarily in all cases raises its mother to the status of a wife—a point which it is not necessary to discuss—it is clear that such an acknowledgment as the present, which acknowledges the mother as wife, involves that consequence. Their Lordships, therefore, cannot find, on a careful consideration of the evidence, and of the reasons given by the Judge in the Civil Court, in his finding on the facts, any sufficient reason for reversing his decision. His Judgment seems to be founded on facts fairly inferrible from the evidence, and sufficient under Mahomedan law to confer on the child the status of legitimate son, and on its mother to whom the declaration extends that of a lawful wife. Their Lordships will therefore humbly advise Her Majesty to reverse the decision appealed from, and to confirm the decision of the Principal Sudder Ameen, with the costs of the Appeal in the Sudder Court. The Respondents must also pay the costs of this Appeal.