

Ismail Ahmed Peepadi - - - - - *Appellant*
v.
Momin Bi Bi and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 29TH OCTOBER, 1940

Present at the Hearing :

LORD ATKIN
LORD THANKERTON
SIR GEORGE RANKIN

[*Delivered by* SIR GEORGE RANKIN]

The appellant Ismail Ahmed Peepadi (herein called "the plaintiff") was born on the 1st May, 1919. On the 12th November, 1936—when he was seventeen years old—the suit out of which this appeal arises was brought on his behalf in the District Court of Amherst in Burma. Abdul Guffoor, his mother's elder brother, acted as next friend, and on 8th December, 1936, leave was obtained to sue *in forma pauperis*. The purpose of the suit was to establish that the plaintiff was the legitimate son and only child of one Haji Ahmed Peepadi, an inhabitant of Moulmein, who had died there on 8th August, 1935, leaving one widow Momin Bibi, the first defendant; and that under the law applicable to Sunni Mahomedans the plaintiff was entitled to a fourteen annas share in the deceased's estate. This claim had been first made, so far as appears, by a lawyer's letter dated 18th February, 1936. The estate of the deceased consisted in part of a one-fourth share in the estate of his father who had died on or about the 12th January, 1935. The defendants to the suit, in addition to the widow, were the deceased's brother Cassim, his step-brother Hashim, and two step-sisters. They all joined in one written statement dated 21st December, 1936.

The case made by the plaintiff was that Ahmed Peepadi, the deceased, had married the plaintiff's mother Mariam Bibi on or about the 20th October, 1916, and that though he had in the end dissolved this marriage by giving her *talak* this divorce had not taken place until after the appellant's birth. Save that the date of the divorce was alleged to be "some time after the birth of the plaintiff" no date was

assigned to it by the plaintiff, but the evidence called for the appellant is to the effect that he was over a year old at the time. It is proved and admitted that on the 3rd July, 1921, at Rangoon Mariam Bibi married again, her second husband being called Ismail. The date of her death is not stated in any of the pleadings, but is put by a witness Maung Ba (D.W. 11) and by the learned District Judge as about 1925.

The case made by the pleading and witnesses of the defendants is that though Ahmed Peepadi's marriage to Mariam Bibi had taken place on 20th October, 1916, as alleged by the plaintiff, it was dissolved on the 10th November, 1916—within a month—by a *talaknama* being served upon her on her husband's behalf.

The single issue framed by the Trial Court was: Is the plaintiff the lawful issue of Haji Ahmed Peepadi? Over a score of witnesses were called on each side. After the learned District Judge Mr. A. T. Rajan, who began the trial, had in March, 1937, heard twenty-two of the witnesses for the plaintiff he was succeeded by another learned judge Mr. Ba Hla Thein, who from June to September, 1937, heard two more witnesses for the plaintiff, the plaintiff's own evidence and the oral evidence for the defendants. Judgment was given by Mr. Ba Hla Thein on 27th October, 1937, in favour of the plaintiff, finding him to be the lawful issue of Ahmed Peepadi deceased, and a preliminary decree for administration of the deceased's estate upon that footing was drawn up. This, by some error which is unexplained, directed the defendants to pay to the plaintiff two lakhs of rupees, but its terms need not now be scrutinized. On appeal by the defendants to the High Court at Rangoon the decision of the Trial Court was reversed by Goodman Roberts C.J. and Dunkley J., who held that the plaintiff had failed to prove that he was the lawful son of Ahmed Peepadi. From their decree of 6th April, 1938, dismissing the suit the plaintiff has appealed to His Majesty in Council.

The matter which requires to be determined is the date of the divorce whereby the marriage of Ahmed Peepadi to Mariam Bibi was dissolved. Though the *talaknama* was presumably dated it has not been produced by either side and their Lordships are unable to draw an adverse inference against either party on that account. The marriage of 20th October, 1916, is not disputed nor is it disputed that Mariam Bibi gave birth to the plaintiff on 1st May, 1919. If the divorce took place after the plaintiff's birth section 112 of the Indian Evidence Act would conclude the present case in his favour since no case is made of the husband and wife having had no access to each other. A question has been raised whether section 112 applies only to cases in which the continuance of the marriage is established positively or directly, or whether it can be brought into effect by proof of the marriage and by the consequent presumption that the relationship continued. There is in India at least one authority in favour of the latter view *Bhima v. Dhulappa*, 7 Bom. L.R. 95. But

as their Lordships have not found it necessary to call upon counsel for the respondents and as the decision of the appeal does not in their view depend upon any question as to the burden of proof, they do not propose to discuss any general questions of this character. The presumption of continuance is dealt with by the Indian Evidence Act in section 114 (cf illustration (d) thereto). Under section 4 it was open to the Court in India upon proof of the marriage of 20th October, 1916, either to regard as proved the subsistence of the marriage in May, 1919, unless and until it should be disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of section 4 of the Act in a judicial manner according to the circumstances of the case. The right of the appellant cannot under the Act be put higher, and their Lordships will not assume that the continuance of the marriage requires for the purposes of section 112 to be shown in any special manner.

Ahmed Peepadi belonged to one of several Moslem families who had migrated to Burma from Surat in Western India, and had settled in Moulmein, where they were known as Soorties (Suratees). His age at the time of his death in 1935 is said by his first cousin (D.W. 15) to have been 60 or 65 years, so that in 1916 he would be some forty years old. Mariam Bibi is said by one witness to have been at that time 20 or 22 years old, but neither her mother nor her sister mention her age in their evidence. It appears from evidence which is hazy that Ahmed Peepadi was married four times in all—his wives being taken in succession. The first was Khatiza (a relation of the witness Jeewa) who died, it would seem, about 1912. Mariam Bibi would seem to have been the second. It is said by the defendant Cassim in his evidence that Ahmed Peepadi married Ainsha Bibi, daughter of Hashim Bawa Jan, in 1922, and married the first defendant Momin Bibi a year and half before his death—that is about 1933. Ahmed Peepadi seems to have lived throughout at his father's house in the neighbourhood of the Big Bazaar of Moulmein. The home of Mariam Bibi, her mother and sisters was not far away—a house numbered 52 Kwingyaung Street in the Maunggan quarter of the town.

Mariam Bibi, according to the evidence for the plaintiff, lived with her mother in Moulmein for a year or so after her divorce; then remarried and went to live in Rangoon, the plaintiff being kept with her mother at Moulmein on the request of Ahmed Peepadi who said he had no one to look after the child. It is also said by the plaintiff and Ma Halima that they lived with the defendant Cassim for a time, this arrangement being given up only because the plaintiff quarrelled with Cassim's sons, but Cassim and Golam Hussein Bangee (D.W. 19) his neighbour deny that the plaintiff ever lived with Cassim.

The years between 1921 and 1935 would seem to afford sufficient time for conduct on the part of Ahmed Peepadi showing whether he did or did not regard the plaintiff as

his son. It is true that Mariam Bibi being poor and of lower social standing, his marriage with her seems to have been kept to some extent secret and he never seems to have taken her to live at his father's house. Hence the plaintiff's case does not necessarily fail because Ahmed Peepadi is not shown to have treated the plaintiff as one would ordinarily expect an only child to have been treated by his father. Though it is by no means the case made by the plaintiff or his chief witnesses, the learned District Judge thought that the effect of the evidence was that Ahmed Peepadi did not openly acknowledge the plaintiff as his son but treated him as one until his death, while all the other members of the family treated him as an impostor or outcast. Now by far the most important question in such circumstances is whether Ahmed Peepadi maintained and supported the plaintiff during all these years. The plaintiff and Ma Halima give evidence of a very sketchy character of payments made in a casual and uncertain manner, and though the matter is not given by the learned District Judge the importance which it deserves, his view is that the evidence of the plaintiff and his grandmother on this point is uncorroborated and must be left out of account altogether. The learned judge rejects in like manner certain witnesses called to show that Ahmed Peepadi used to take the plaintiff and Mariam Bibi to Thaton. On these points the correctness of the findings of the learned judge can hardly be disputed and the absence of all reliable detailed evidence that Ahmed Peepadi was supporting the plaintiff is a great difficulty in the plaintiff's way. Evidence was given that Ahmed Peepadi after the plaintiff's birth continued to visit Mariam Bibi at 52, Kwingyaung Street in the Maunggan quarter of Moulmein, that he took some notice of the plaintiff both in 1920 and in later years, that he attended the head-shaving and circumcision ceremonies of the plaintiff. The evidence about Ahmed Peepadi's visits to Mariam Bibi in 1920 is of great importance if it can be relied on; but on the other points the evidence comes to little and is of doubtful credibility in any view. One Eusoof Ebrahim Mayet (P.W. 5) spoke to Ahmed Peepadi's visits to Mariam Bibi in 1920 giving as his reason for fixing the date that he was working at the time on the wreck of the vessel "War Puffin," which was sunk near the Amherst lighthouse. This evidence was countered by that of a witness called Karimuddin (D.W. 6) who deposed that work on the ship was abandoned in May, 1920, and that Mayet could not have been at work on it until 1923. The learned District Judge who had not seen the witness Mayet accepted his evidence, but their Lordships think that it would be most unsafe to rely upon it. So too with the evidence of a Chinese merchant named Ah Choy (P.W. 21) who stated that ten or twelve years before (1925-7) he travelled to Rangoon with Ahmed Peepadi and Ahmed Sulaiman Jeewa; that Ma Halima and the plaintiff (then 8 or 9 years old) had a meal on the train in their company; that Ahmed Peepadi on that occasion told the witness that the boy was

his son, and that he could now identify the plaintiff as the boy since the railway compartment was lighted. The occasion of the witness's visit to Rangoon seems to have made but small impression upon so excellent a memory; that it was a Viceroy's visit, and that the Viceroy was Lord Curzon were tentatively suggested, but in the end he could only say that it was some feast. By stating that he went with Ahmed Peepadi and Jeewa by special arrangement this witness does not remove himself from the very well known category of "chance witness," whose evidence so commonly discloses a meeting with the very person whose admission is required and details how the admission was volunteered in the course of conversation. Though the "chance witness" is not necessarily a false witness, it is proverbially rash to rely upon such evidence. In the present case the evidence of the plaintiff himself as to staying at the Moulmein Club at Rangoon when Ah Choy was also there fits in ill with Ah Choy's statement, and the witness Jeewa further contradicts it.

Again, a conveyance of the house 52, Kwingyaung Street, dated 29th January, 1917, is produced whereby the property is transferred by Ahmed Peepadi for Rs.600 to Mariam and her two sisters without any mention being made either that Mariam was the wife of the transferor or of any other consideration than Rs.600. The witness Jeewa says that the property was conveyed after and because of the divorce of November, 1916, and only after some persuasion on his part. Ma Halima says that it was conveyed after the marriage and that Jeewa had promised it at the time the marriage was being arranged. It seems that the house had formerly belonged to Mariam's father and that Ahmed Peepadi had obtained it by paying off certain charges. The learned District Judge thought that this conveyance proved that no divorce had taken place by January, 1917, because it contained no recital to that effect, but in their Lordships' opinion it is at least as cogent to say that had Mariam been the wife of the transferor she would have been so described. The plain fact is that the document of itself does not decide between the rival stories of its origin. On these three matters the evidence of Mayet, the evidence of Ah Choy and the effect of the conveyance of 29th January, 1917, their Lordships prefer the view taken in the High Court to that of the learned trial Judge. They see nothing in any of these matters which can be regarded as decisive in the plaintiff's favour.

It remains, however, that a number of witnesses have spoken to the divorce having taken place when the plaintiff was a year or more old. These need not all be mentioned, but Mariam's mother, brother, sister and brother-in-law say so, and in their case the sole question is as to their truthfulness since they would certainly know the facts. Of other witnesses to this effect Mahomed Esa (P.W. 17) who lives in the same street as Ma Halima dates the divorce as in August, 1920, and his brother Mahomed Moosa (P.W. 18) says that the divorce was a year after the plaintiff's birth.

Similar evidence is given by Ahmed Sultan (P.W. 22) but this witness is confused as to dates. This evidence regarded as a whole suffers heavily from the failure—almost, if not quite, complete—to give a specific account of the date and circumstances of the divorce. Its vagueness makes it unimpressive. However, though this and the failure of the plaintiff to afford any reliable proof of Ahmed Peepadi having provided his maintenance are matters which tell against the plaintiff's case, it is necessary to take account of the fact that the defendants' case that Mariam was divorced within a month of marriage is one to which some improbability attaches. As against the story which would put the divorce towards the end of 1920, the evidence of the defendants' witnesses must be carefully scrutinised. The main witness on this point, Ahamed Sulaiman Jeewa, gave evidence on commission in January, 1937, before the trial, and died according to the defendant Cassim on 3rd April of that year. That he was a great friend of Ahmed Peepadi is not in doubt in view of Ma Halima's statements. His evidence is that fifteen or twenty days after the marriage Ahmed Peepadi came to him at his shop and complained of Mariam's conduct and said he wanted to divorce her: that two days afterwards Saya Galay (described as "priest" of the mosque) at the witness's shop wrote down at Ahmed Peepadi's dictation a *talaknama* which was signed by the latter. This document was given to two persons Ebrahim Hashim Poo and one Madani, now dead, who went by the name of Lulu. They were asked to go with Mamoo Ko Yacoob and serve it upon Mariam. They returned and said they had done so. Ma Halima who gave her evidence in March, 1937, said that Ko Yacoob and Lulu brought the *talaknama*, that they are both dead, that Ebrahim Poo did not come with them, and that the *talaknama* was taken to Rangoon by Mariam to show to her second husband. Ma Sisha (P.W. 11), though called for the plaintiff, stated that she was present when the *talaknama* was delivered by Yacoob and two men from the Big Bazaar, that this was before the plaintiff's birth, that Lulu was one of the two men, but she did not know if Ebrahim Poo was the other. The defendant Cassim says that as Ahmed Peepadi had no children he adopted the daughter of Lulu, who was given jewellery and money by him and by his parents. Ebrahim Hashim Poo (D.W. 8) corroborates Jeewa and states that he went with Lulu Madani and Yacoob to Mariam's house and gave her the *talaknama* and that Lulu read out its contents. He is cross-examined to suggest that he is not a person who would have been entrusted with the duty of serving a *talaknama*. Moti Rahman (D.W. 12) deposed that Lulu *alias* Madani was his aunt's husband, that he lived in Abrew Street and died at the age of 43 about 18 years before. To this is added proof of the death register for 1919 in which is an entry of the death of one Lulu aged 43 years, a Mahomedan trader of 4, Abrew Street on 8th December, 1919, and the signature of Moti Rahman as the person reporting the death. Moti Rahman was not cross-examined

at all by counsel for the plaintiff, though the point of his evidence is manifest—viz., that if Lulu died in December, 1919, he could not have taken part in serving the *talaknama* on Mariam Bibi when the plaintiff was a year or a year and a half old—as the trial judge puts it, towards the end of 1920, or as the plaintiff's witness Mahomed Esa (P.W. 17) puts it, in August, 1920. The course adopted towards this evidence by the plaintiff and assented to by the trial judge is to suggest that the Lulu who died in 1919 was a different person from the Lulu who according to the evidence on both sides took part in serving the *talaknama*. This in their Lordships' opinion as in that of the High Court is unreasonable. That the Lulu who served the *talaknama* was called Madani, was spoken to by Jeewa before the trial began as also by Ebrahim Poo and Moti Rahman, who are not cross-examined to suggest the contrary. The person in question was known to Ma Halima and his identification could have been challenged in detail, particularly if he was the father of Amina Bibi who was said by Cassim to be living in the Peepadi's house as having been adopted by Ahmed Peepadi. To wait until the time of argument to suggest that there were two Madanis called Lulu, without making any attempt to enquire of the witnesses, is not a reasonable way to conduct such a case as the present. On this point their Lordships find themselves in agreement with the High Court in thinking that it must be taken that the entry in the death register relates to the Lulu who took part in effecting Mariam's divorce. The case made by the plaintiff as regards the date of divorce is thus displaced: it cannot have taken place when the plaintiff was a year old or at any time after 1919.

There is a still more serious challenge to the plaintiff's case in the evidence given by Maung Ba and Mrs. Buchanan at the trial, and by U Chit Swe taken on commission in September, 1937. Maung Ba says that from 1918-23 he was clerk to a pleader called Buchanan who practised at Moulmein, and who in 1923 went to practice at Insein; that in 1920 Mariam Bibi came to Mr. Buchanan with her child and her mother to get him to take steps to obtain maintenance for the child against a barrister U Chit Swe. He says that at first Mr. Buchanan did not like to file a case against a brother lawyer but in the end she came with the witness Korban Ali (D.W. 18) and insisted, so that Mr. Buchanan was persuaded to send a notice to U Chit Swe. That notice or letter was typed and served on U Chit Swe by Maung Ba himself according to his evidence, and a carbon copy of it kept by Buchanan in the ordinary course of office practice has been produced by his widow (D.W. 1) from among the papers left by him. This is Exhibit 8. It is dated 29th April, 1921. It mentions that the client is Ma Yan of Maunggan Quarter, Moulmein, and it demands thirty rupees for maintenance for herself and her child. There are also two entries in Buchanan's fee book showing receipt of Rs.10 and Rs.5 on 29th April and 11th May of that year from Ma Yan in respect of "criminal case 20." Ma Yan is the Burman form of

Mariam, and Maung Ba lived near to Kwingyaung Street in Moulmein and knew the plaintiff's mother, though Mrs. Buchanan did not. His evidence is corroborated by Mrs. Buchanan and by Korban Ali, who is a native of Moulmein and claims to have known Ma Halima from his childhood. It seems unnecessary to dwell on their evidence in view of the position of U Chit Swe, who admitted to having been intimate with Mariam Bibi for about a year and a half in 1917-8. He says she claimed to be the divorced wife of Ahmed Peepadi. He says she had no child then. He admits receiving a notice in terms of Exhibit 8 from Mr. Buchanan. In cross-examination he stated that he had a child by a girl whom he kept for nine months in 1916, and that his brother made a lump sum payment to her: that he did not reply in writing to Mr. Buchanan's letter but spoke to him denying the claim. The learned trial judge arrived at the conclusion that: "It is more likely than not that the Ma Yan referred to in the Exhibit notice was the other woman with whom U Chit Swe got a child and of whose name he says he has no recollection." Their Lordships bear fully in mind that Mrs. Buchanan said that there was a settlement in Ma Yan's matter before she left for Insein, and also that she said that the child she saw might have been under a year, but they think that the conclusion of the learned judge is without foundation. It is necessary to alter the dates and facts given by U Chit Swe to fit in with it. That there should be two women of the same name belonging to the same quarter of Moulmein, and with a child about a year old, and that the defendants should be able to get the person alleged to have had relations with the one to pretend to have had relations with the other is very far from probable. The witnesses Maung Ba and Korban Ali may be open to suspicion of partiality and perhaps of something more, but when their evidence is taken in connection with the admitted documents and the evidence of U Chit Swe it cannot be rejected upon a gratuitous supposition as to there having been in 1920 and 1921 another woman of the same name claiming against U Chit Swe. It is true, however, that before arriving at a final conclusion on this point account should be taken of the evidence as to the name under which the plaintiff passed as a schoolboy. In 1927 and 1928 he was entered in the books of his schools as Ismail, son of Peepadi, and from 1931 to 1935 he was at the Government High School, Moulmein, under the name of Ismail Peepadi, son of Ahmed Peepadi. In June, 1935, he was admitted as a free scholar to a Muslim school at Kandawglay in Rangoon on the request of a Mr. C. E. Dooply (P.W. 3) and was taken there by Ma Halima. Both Dooply and the superintendent of the school have given evidence: the former says that he asked the school to take the boy free as he was poor: the latter says that the reason explicitly given was that the boy was an orphan, and that Abdul Gaffoor was dealt with as the boy's guardian. Notwithstanding that Ma Halima says that Ahmed Peepadi sent her and the boy to Dooply, the evidence of Dooply and of the superintendent does not show

that Ahmed Peepadi had anything to do with the plaintiff being sent to this school, and it seems certain that he paid nothing on his account. Their Lordships cannot think it improbable that the boy should have been given the name of the mother's husband even if he were born more than two years after divorce; nor do they think it at all likely that the husband would make it his business to object, if he got to know of the name under which the boy was sent to school. Reviewing the evidence as a whole their Lordships agree with Dunkley J. in holding it proved that in 1920-1921 Mariam Bibi was alleging that U Chit-Swe was the father of the plaintiff.

It is not necessary that any opinion should be expressed as to the reliability of the witness Haju Mahomed Ali, who says that he acted as witness at the second marriage of Mariam in 1921 and that in answer to his question she stated that she had been divorced five or six years before. Nor do their Lordships propose to discuss the value of the entries in the diary (Exhibit 4) which are said to be in the handwriting of Ahmed Peepadi, or the question whether the complaint against Mariam Bibi brought in May, 1918, in the Court of the Honorary Magistrate at Moulmein was made by Ahmed Peepadi. They think it right, however, to mention the will dated 15th July, 1935, which is spoken to by A. L. Roy (D.W. 14), Ahmed Mahomed Peepadi (D.W. 15) and A. S. Jeewa. This declares Cassim and Momin Bibi to be the legal heirs of Ahmed Peepadi the testator, and that he has no other legal heir. Their Lordships agree with the High Court in thinking that no sufficient reason can be shown for treating this document as a forgery, especially in view of the fact that it was presented to the Court of a magistrate on the 24th September, 1935, within a few weeks of the death.

In the result their Lordships think that the High Court have taken the right view of the evidence. They do not think that it is shown that the marriage of Mariam with Ahmed Peepadi was a subsisting marriage in 1919, but consider on the contrary that the case of the defendants as to the date of the divorce must be accepted as true. They will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs.

In the Privy Council

ISMAIL AHMED PEEPADI

v.

MOMIN BI BI AND OTHERS

DELIVERED BY SIR GEORGE RANKIN

Printed by His Majesty's Stationery Office Press
POCOCK STREET, S.E.1.
1940