Privy Council Appeal No. 67 *of* 1915.

Allahabad Appeal No 4 *of* 1913.

Musammat Atkia Begum - - - - *Appellant,*

v.

Muhammad Ibrahim Rashid Nawab - - *Respondent,*

FROM

THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY, 1916.

Present at the Hearing:

LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.
MR. AMEER ALI.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment and decree of the High Court of Judicature for the North-Western Provinces, dated the 30th July, 1912, which reversed a judgment and decree of the Court of the Subordinate Judge of Aligarh, dated the 13th June, 1911.

The action out of which the appeal has arisen was instituted by the respondent against the appellant for restitution of conjugal rights.

The main questions for determination are—

(1.) Whether the appellant and respondent were legally married according to the Muhammadan law at Mecca on the 20th July, 1907.

(2.) Whether the appellant did in fact give her consent to this marriage.

(3.) Whether the appellant was at the time of the marriage adult and competent to give her consent thereto.

The Subordinate Judge who tried the case and the High Court have each found as a fact that a marriage ceremony, purporting to be a ceremony between the appellant and re-

spondent, was solemnised at Mecca on the 20th July, 1907. For the purposes of this appeal, that fact must be taken as incontrovertibly established.

It is, therefore, now quite irrelevant to consider whether the marriage was an imprudent or a desirable one. And, with one qualification, it is equally irrelevant to speculate as to whether the old lady, Arusa Begum, who undoubtedly promoted it and managed the ceremony, was influenced by affection for the appellant, her grand-daughter, or by a greedy desire to procure a rich wife for her needy nephew, the respondent. The qualification is this; that avarice possibly more frequently than affection tempts to illegitimate enterprises, and to the manufacture of evidence to justify them.

If the appellant was on the 20th July, 1907, a minor, the ceremony then performed between these two people, who were Mahomedans, would, however regular in other respects, have been ineffectual to create a valid marriage unless the guardian of the minor had previously consented to the marriage. This consent is an essential.

If the appellant was at this date a major, the guardian's consent would be unnecessary; she would have been legally entitled to please herself, to marry the man of her own choice, despite family or social opposition. According to Mohamedan law a girl becomes a major on the happening of either of two events: first, the completion of her fifteenth year, and, second, on her attainment of a state of puberty at an earlier period. The burden of proving that a girl has in either of these ways reached her majority rests upon those who allege it and rely upon it. These propositions were not questioned in either of the Courts in which this case was litigated. The result is that the respondent was bound to establish by legal evidence either that his marriage was contracted with the consent of the girl's lawful guardian, or that having reached her majority in either of the ways already indicated it was contracted with her own consent. It is necessary to insist upon the words "legal evidence" because it appears to their Lordships that hearsay evidence—in some cases, indeed, mere gossip, wholly inadmissible in its nature—was admitted and treated as substantive proof of the fact related or discussed. Two instances may be referred to—one so coarse as to be almost incredible, and the other such a travesty of legitimate methods of proof as to be comical. The first is where Bashir Ahmad, an alleged witness to the reading of the Nikah, having taken upon himself to state, in answer to a question, asked, no doubt, on cross-examination, that he knew the appellant was of age by certain signs of puberty recognised by the Mohamedan law. When asked how he knew this he replied: "Through her father." It is difficult to believe that the girl's father can ever have bestowed this confidence upon the witness; but even if he had done so, the repetition of what the father said was no evidence whatever of the substantive fact of the girl's puberty.

The other instance is furnished by the evidence, taken on commission at Mecca, of one of the witnesses of the plaintiff in the suit, named Muhammed Said Shatta. After being examined by the person appearing for the defendant, he was re-examined by the person appearing for the plaintiff, and was asked: "Did you hear from anybody that Atkia Begum was of age?" and he replied: "I heard from my wife, who heard from the mother of Atkia Begum." As a Commissioner before whom evidence is taken does not rule points as to the admissibility of evidence, it may be impossible to prevent questions and answers such as these appearing on the face of depositions. That, however, is not the point. The point is that the deposition appears to have been read in evidence as it stood, without any objection having been made to this undoubted hearsay. The evil consequence of the admission of such evidence as this is not merely that it prolongs litigation, and increases its cost, but that it may unconsciously be regarded by judicial minds as corroboration of some piece of evidence legally admissible, and thereby obtain for the latter quite undue weight and significance.

The litigation was prolonged. It developed into many branches. The case of the plaintiff, as it progressed, took dissimilar shapes. Conflicting and irreconcilable contentions were from time to time put forward on his behalf, and as each of these was fashioned, evidence was forthcoming to sustain it, often in conflict with that previously adduced to support the earlier contention. It is much to be regretted that the respondent has not appeared on the hearing of this appeal. He has chosen, however, not to do so, and their Lordships have therefore felt it incumbent upon them to examine the evidence from every point of view, and to consider possible suggestions and contentions which, had he appeared, might not have been made or relied upon on his behalf. To turn to the facts.

The appellant is the eldest surviving daughter of Haji Abdul Jalil Khan and Musammat Mamhua Begum, his wife. This gentleman was a man of wealth and position. He owned property the yearly income of which was about 14,000 rupees. The father and mother were natives of and usually resided in Aligarh, in India, but for three or four years before July 1907 he and his family resided at Mecca. He had living with him in his house there Arusa Begum, his mother-in-law. This old lady is not only the grand-mother of the appellant, but the aunt of the respondent, who at the time of marriage was resident at Mecca, was about 17 years of age, and was earning about 5 rupees per month. The appellant had a brother and a sister, both younger than herself. Her mother died about two months before the 20th of July, 1907. Her father died on the 16th or 17th of that month. He made no will disposing of his property, so that her share of the ancestral estate would bring in a rental of about 3,000 rupees per annum. This man had an elder brother, one Abdul Jalil Khan. He, as soon as he heard of his brother's death, applied to and obtained from the District Judge

of Aligarh, a certificate, dated the 13th of August, 1907, of guardianship of the person and property of the minors.

On the following day, the 14th August, an application was made to the same District Judge by two residents of Aligarh praying that this certificate might be revoked, that the minors might be allowed to remain in charge of their maternal grandmother, Arusa Begum, and their property be put under the management of the Court of Wards, on, amongst others, the wholly erroneous ground that by Mahomedan law and statutory enactments the maternal grand-mother of the minors had a preferential right to take charge of them as against anyone else.

On this application coming before the District Judge on the following day, the 15th August, 1907, he required Abdul Jalil Khan to give an undertaking that he would not celebrate the Nikah of either of the minor girls without the permission of the District Judge. And upon that undertaking being filed with the record, it was ordered that the above-mentioned certificate be handed to him. This made it impossible for Abdul Jalil Khan to give either of the minor girls in marriage to a son of his own, as it was alleged he designed to do. The necessary papers were then transmitted to the British consulate at Jeddah. The appellants' uncle repaired to Jeddah with one Abdul Aziz, a friend. He himself remained at Jeddah, and sent Abdul Aziz on to Mecca, who, with the permission of the consul at Jeddah, brought the minors back to that town, and on the 23rd October, 1907, the latter official gave to Jalil Khan a certificate stating that they had been handed over to him. The uncle started with the children for Aligarh. Arusa Begum was permitted to accompany them. The respondent subsequently came from Mecca to Aligarh.

Arusa Begum on the 7th December, 1907, caused an application to be made under section 10 of Act 8 of 1890 to the District Judge of Aligarh for an order cancelling the certificate of guardianship obtained by the appellant's uncle, and for her own appointment as guardian in his stead. Generally speaking one has to complain that the records in Indian Appeals are swelled to an enormous size by the printing of many irrelevant and useless documents. In the present appeal the reverse is the case, for only the first paragraph of this important document is printed (p. 146), notwithstanding the fact that the statute under which the application was made sets forth in great detail the facts which must be stated, this is a grave and unintelligent omission. The document is, in their Lordships' view, of great importance, because the case made in the High Court by the respondent was that the appellant at the date of her marriage was 14 or 15 years of age, and had by reason of her early development reached, at that date, a state of puberty, had with her own full consent become a married woman, and had lived and cohabited with him as his wife for a period of three weeks from the 20th July, 1907, onwards.

Upon that case the respondent succeeded in obtaining in his favour the order appealed from. If that was a true case an application one month later by her grandmother, who knew all the facts, to be appointed guardian of the person and property of this mature and wedded wife, on the ground that she was still a minor, was a fraud upon the Court, and an imposture as inexplicable as it is inexcusable. In the only paragraph of the document printed it is, however, set forth that the appellant was at its date, the 23rd December, 1907 (for it must be taken to speak from its date), about 13 years of age, that her sister was about 5 years of age, and her brother about 11 years of age. Arusa Begum signs a declaration at its foot that the facts set forth are true to her own knowledge.

Well, this application failed, and Mr. de Gruyther who appeared on the part of the appellant was perfectly justified in contending that these statements showed of themselves that the whole case as to the alleged majority of the applicant at the date of the marriage was an afterthought and an invention. The respondent having instituted a criminal prosecution against Jalil Khan for forcibly removing his wife and beating her, in which he failed, on the 16th March, 1908, instituted the present suit against the appellant and her uncle claiming restitution of his conjugal rights, and an order that the uncle should be directed not to interfere with her. The first paragraph in the plaint is very significant. It runs thus: "The plaintiff was married to defendant No. 1 (*i.e.*, Atkia Begum) with the consent of her parents in accordance with the Mohammedan Law and the amount of the dower was fixed at 12,000 rupees." In paragraph No. 3 it is stated that the parents of Atkia Begum died at Mecca before the marriage, that she, the appellant, was then living at Mecca with her maternal grandmother Musammat Najm-un Nisa *alias* Arusa Begum. He conceals the indecent haste with which this marriage ceremony was hurried on almost on the morrow of the father's death. He verifies these particulars. The pregnant fact, however, is, that not a word is said in this pleading about the alleged majority of the wife at the time of the marriage, or the fact that she had herself consented to it. On the contrary, it is obvious from paragraph 1 that what was then intended to be relied upon to give validity to the girl's marriage while a minor, was the consent given to it in prospective by her father before he died, and the authority given by him to Arusa Begum to have it performed. Evidence was given on the first hearing in August and September 1908 before the then Subordinate Judge. Arusa Begum was examined by Commission on the 21st August. She states that the appellant was at the time the witness gave her evidence, *i.e.*, thirteen months after marriage, in her 15th year. She further said it was a month and a year since the appellant's mother and father settled the

marriage, that they desired it but could not celebrate it during their lifetime, and that she, the witness, had it celebrated after their death, that the appellant's father sent for the appellant and told the witness the date which he had fixed for the appellant's marriage, that she should be married to Ibrahim Rashid soon, and that it was in accordance with the father's will, thus expressed, that she, the witness, had the Nikah ceremony performed. In reply to her pleader she did not say anything about the appellant being adult. He had not asked her, presumably because he did not think it of importance. If it was one of the main issues in the case he scarcely could have omitted to do so, but in reply to the Commissioner she said that the appellant was married four days after her father's death, that she, the witness, gave permission in accordance with the will of her parents, and the Nikah was recited. She then added, apparently in reply to a question by the Commissioner, "the girl was adult." She further stated that the girl's father died in the evening, and that he made the will in the morning of the day he died; that he called his daughter in and made his will (a nuncupative will) in her presence. She then names ten or twelve persons who were present in the chamber of the dying man when he made his so-called will. The suggestion thus made casually for the first time was not carried further. Arusa Begum, though examined, cross-examined, and re-examined at considerable length, did not say another word about it, and nothing at all about the girl being adult, having made her own choice, and of her own free will consented to this marriage. The same is true of the four other witnesses. No question was put to any one of them by the respondent's pleader on any one of these points. It is inconceivable that he would have omitted to do so if the puberty and independent consent of the girl were considered vital issues in the case. The mass of the evidence given was directed to show that it was Arusa Begum who gave this girl in marriage, consented to the marriage, procured it, and arranged for the ceremony in pursuance of the directions given by the deceased in his nuncupative will, in order to carry out the wishes of the girl's parents. One of the witnesses, Ilmas, the emancipated slave of Arusa Begum, stated that after the marriage the appellant and the respondent went to live in the room occupied by the deceased up to his death, his death-bed apparently serving as his daughter's bridal couch, and continued to live there for three weeks. Arusa Begum was not asked about this. She gave no explanation of the indecent haste with which the marriage was solemnised. And it might well be that, whether the marriage was believed to be valid or invalid, whether the girl had attained puberty or not, this cohabitation, if it took place, might be thought to render the questioning of the validity of the marriage the more improbable and have the more

effectually secured the prize for the needy bridegroom. The respondent was not examined ; he had gone to Mecca to procure further evidence, and had, up to then, not returned.

On behalf of the appellant, she herself, her uncle Abdul Jalil Khan, and Babu Bhagwan Das, the clerk of the Aligarh Collectorate, were examined. The last named of these merely to prove the communication with the Consul at Jeddah, and the second to prove that the appellant's age was, at the time he gave evidence, 15th September, 1908, apparently less than 13 years; that her father and mother were married fifteen or sixteen years previously, and that no child was born to them during the first year of their marriage; that in the next year a daughter was born to them, but died about a year or a year and a half after her birth ; and that the appellant was born a year and a half or two years after the death of the first child. He stated he never received a telegram or letter from Mecca that the appellant had been married, and denied he had ever said so to anyone. The rest of his evidence is irrelevant to the present controversy.

The appellant was examined on commission. She denied that her parents or either of them agreed to celebrate her Nikah with the respondent. Stated that her father did not fix any date for her marriage. That no members of the families of her paternal or maternal grandfather were present at the death of her parents. She further stated that she was examined before the Judge two months previous, and she admitted the correctness of her depositions of the 8th March, 1908, in which she stated that her age was then 14 years, and that on her faith and on the Koran her Nikah had not been celebrated with Ibraham Rashid, the respondent, or anyone. On cross-examination by the gentleman who was described as the pleader of her maternal grandmother, she stated that she did not know whether the respondent was in any way related to her grandmother, that she knew him for three or four years, and that he had been employed by her mother for three or four years ; that she did not know her age ; that she had been observing purdah for four or five years. No question was put to her as to whether she had ever engaged herself to the respondent to marry him, or had consented to marry him. Nor was she asked any question as to whether she had attained puberty before the date of the marriage, or had lived with the respondent as his wife at Mecca for three weeks after it. It would be absurd to suggest that these questions would not have been asked, if they were considered vital matters, from feelings of delicacy. Well, the case then closed. The evidence from Mecca had not arrived, though, in the opinion of the Subordinate Judge, sufficient time had been given to procure it. He resolved to proceed to decide the case on the evidence before him on the 15th September, 1908. Application was made on behalf of the respondent to the Subordinate Judge to appoint a lady doctor to examine

the appellant in order to ascertain, first, whether Atkia Begum had then attained purberty and was an adult, and how long she had been so; and, second, whether she was still a virgin or a married woman. The pleader of the appellant apparently opposed this application, and the Subordinate Judge dismissed it on the ground that it was made too late, and that the lady could not be compelled to subject herself to such a personal examination. The learned Judges of the High Court appear to have thought that the lady's refusal to submit to this examination was very significant—that it showed the respondent's *bona fides* in the truth of his case; that he was suggesting a test which, if his case was false, would have put him out of Court, that a lady doctor could have given most valuable evidence on these points, even without a minute examination as to whether the appellant was a virgin or not, and that a medical examination would have been of the utmost value.

The learned Chief Justice expressed himself to this effect, though apparently he and his colleague had accepted the story of the respondent that he had, twelve months previous to the application, lived and cohabited with the appellant as his wife for a period of three weeks. With all respect to the learned Chief Justice their Lordships are unable to adopt his view as to the crucial nature of the test proposed, or the result of the examination, or the significance of the refusal to undergo it. The examination might have settled the question whether the lady was, when examined, a *virgo intacta* or not, and to that extent might have tended to corroborate the allegation of connection; but they utterly fail to see how, if she had been then found not to be a *virgo intacta*, it would necessarily have enabled any lady doctor to have determined whether or not she had reached puberty twelve months previously; nor, indeed, how that question could have been determined with certainty even if she had in September 1908 been found to be a *virgo intacta*. No medical evidence whatever was given on this point. Its character or nature cannot be assumed. The evidence on behalf of the respondent, taken on commission in Mecca, not having arrived, the Subordinate Judge refused to wait longer and proceeded to decide the case on the evidence before him. The issues before him were first, were the plaintiff (*i.e.*, the present respondent) and the defendant No. 1 wedded, as alleged, at Mecca? If so, was Musammat Najm-un-Nisa (*i.e.*, the grandmother) competent to give this defendant in marriage?

It will be observed there was no issue at all as to whether Atkia Begum was an adult, or whether she had in fact consented to give, and, in fact, did give, herself in marriage to the respondent.

The Subordinate Judge found that the case as to the marriage at Mecca was utterly false; that the witnesses in support of it had grossly lied. He therefore decided

the first issue in the negative, and that being so he said: "It was not necessary to go into the second." But, he observed, "it is obvious, under the Mohammedan law, that after the death of the parent of defendant No. 1 (*i.e.* Atkia) her paternal uncle could only give her in marriage. Najm-un-Nisa could not, even if authorised by Jalil Khan. It is urged now for the plaintiff that the defendant. No. 1, assented to the marriage. This is not mentioned in the plaint, and the plaintiff's pleader stated, on the 15th May, 1908, that it was Najm-un-Nisa who gave the defendant in marriage. The Subordinate Judge was right in this matter. The pleader for the present respondent had so stated because, apparently, it was believed that the alleged nuncupative will of the deceased would have entitled her so to do. The Subordinate Judge proceeded to deal with the point of the appellant's age. He pointed out that she said at first she was 12 or 13, and then said she was 13 or 14, that her grandmother said she was in her fifteenth year, but that in the latter's application of the 23rd December, 1907, she had stated that the girl's age was 13 years, so that she was evidently a minor. He further stated that he would find the second issue in the negative, and that there was no evidence that she had attained puberty, according to Mahommedan law, on the date of the alleged marriage. He therefore dismissed the suit.

The principle of law here laid down by the Subordinate Judge is well established and was not disputed in any of the Courts below, but it is quite possible that Arusa Begam was not correctly advised as to it, or did not know it, and fancied a nuncupative will of a father would be sufficient to confer authority to give his minor daughter in marriage.

On appeal to the High Court this decree was, on the 16th May, 1910, set aside and a new trial directed, on the ground that the respondent had not had an opportunity of examining his witnesses. It was directed that the Court should give the respondent an opportunity of having his witnesses examined by a commission or a letter of request, whichever was permissible by law. On the 7th February, 1911, the application for a medical examination of the appellant was renewed and refused. The British consul at Jeddah was appointed commissioner to take the evidence of the respondent's Mecca witnesses. He did so, and ultimately returned these depositions into Court. The case was retried, but before another Subordinate Judge, and a further issue was by him framed. It ran thus: "If Musammat Najm-un-Nisa did not give permission, then could defendant No. 1 herself, at the time of the marriage, give her consent to the marriage, according to the Mahommedan law and the statutory enactment for the time being in force, and is the marriage valid? or, on account of being a minor, she could not give her consent, and the marriage is invalid and void?"

That issue is somewhat confusedly framed, but the matter of

importance is that, though neither the appellant nor her grandmother had, as has been shown, been examined closely on the questions thus raised, the pleaders for both parties stated that they did not require to give on this issue any evidence in addition to that already given on the former hearing and by commission in Mecca.

The Subordinate Judge decided that a ceremony of marriage had been gone through, and so far he must be taken to have held that the appellant's evidence to the contrary was unreliable; but he further held that the theory of the nuncupative will was a tissue of falsehood, fabricated to give validity to this marriage. Their Lordships do not understand that the High Court differed from the Subordinate Judge on this point, but if it did so, then their Lordships must differ from it. They concur with the Subordinate Judge on the point. The Subordinate Judge also held, on the evidence, that Atkia Begam was about 12 years of age at the date of her marriage; that there was no evidence other than that of the respondent, that at that age she had developed signs of puberty; and that the latter's statement could not be relied upon, and he ultimately held that Atkia was under the age of 12 years at the date of her marriage, and that if she had not attained puberty under that age she could not give consent to her marriage. He therefore declared the marriage null and void. As their Lordships understand, the High Court only differed with the conclusion of the Subordinate Judge on one point, namely, that the appellant had at that date attained puberty; but there is another question involved, namely, that if she had, in fact, attained that age, and was therefore legally competent to consent to this marriage, does the evidence establish that she did in fact consent to it?

The burden of proving the affirmatives of both these propositions rests upon the respondent. The question is: has he discharged that burden? In their Lordships' opinion he has not done so, and they think an examination of the evidence shows this.

Abdul Moti, who read out the Nikah and is one of the fifteen naibs appointed yearly from Constantinople, said he did not know whether or not Atkia personally gave him permission to read it; that a woman behind the veil made him Vakil, but he did not know whether it was Atkia Begam or not; that he did know the respondent, but did not know either the appellant or her grandmother and did not hear anyone from behind the veil say anything about dower; that the witnesses to the Nikah were Abdullah Rashid, Ahmad Rashid, and Bashir Ahmad, and that he came to know of the Nikah by Bashir Ahmad coming to him and saying that there was a Nikah to be read in "our" house that night and asking him to come to it. He further said that these witnesses told him that Atkia was 14 years of age. This Bashir Ahmad states in his evidence in chief that Atkia was of age a quarter of a year before the Nikah

and that she herself gave permission for it, but on cross-examination he admitted that Atkia did not give him permission for the Nikah, and that he knew she was of age because her father had informed him she had certain recognised signs of puberty ; that nothing was said about dower in his presence and no paper written at the time. On re-examination the leading question was put to him. Did Atkia herself give permission for her Nikah to Kasi Abdul Moti, and he replied yes, which was in direct contradiction to the Kazi's own evidence. Abdullah Rashid, one of the witnesses, who is the brother of the respondent, as is also Ahmad Rashid, stated that Atkia Begum was 14 or 15 years of age at the time of her marriage, that she had lived with his brother as his wife after the marriage, and had herself given permission for it.

This latter statement is in direct contradiction to the testimony of the grandmother, who swore that she had herself given permission for the Nikah in accordance with the will of Atkia's parents. The witness further said that the Kazi asked if the bride was adult or a minor, and the witness replied that she was adult, that then the Kazi said a guardian was unnecessary. The witness then made the strange statement that he found signs of puberty on the person of Atkia a year before her marriage, when she was only 13 years of age, and that consequently he stated that she was an adult. He did not mention what these signs were, or how or when he discovered them. Ahmed Rashid, the remaining witness, was examined on the part of Atkia Begum. He stated that he did not know whether Atkia was of age or not ; that he did not hear her give permission for her Nikah, that she did not make him a witness, that he did not know her age at the time exactly, but thought it was about 9 or 10 years, that nothing was given to her, dress or other thing, at the time of the marriage. No paper was then written, but that a year after the marriage the respondent got a deed written and registered in Mecca. He further stated that an hour before the marriage Arusa Begum called himself, and his brother Abdullah Rashid, from the harem ; and when they reached there they were told that Nikah was to be read, and that other people were sitting down, that his aunt (Arusa Begum) asked him to become a witness, that the marriage was managed by her, but that there was no pre-arrangement of it. So far for the Kazi and the three witnesses, the two brothers and brother-in-law of the respondent.

Abdul Salam, who does not know Atkia, was called upon by the respondent on the third night after the death of the appellant's father and bidden to the Nikah. He was present at the assembly but did not see then any one of the seven friends of the deceased named to him. Mahommed Said Shatta stated he was present at the reading of the Nikah, that he knew the respondent and the appellant through her father, whatever that may mean, but that he did know her voice or appearance, that he did not know whether she was legally of age or not, or

whether she gave permission for the reading of the Nikah or not, that Arusa Begum managed it. He is then asked on re-examination the utterly illegal question already alluded to as to whether he had heard from anyone what Atkia's age was. Abdul Rahim Khan says he was present at the reading of the Nikah. No paper was then written. Did not hear Atkia give permission. He then added she was of age at the time of her Nikah. The latter is a very ambiguous statement, and may mean either that she had completed her fifteenth year or had attained puberty before it. Hafiz Kallan says he knows both the appellant and respondent and was present at the reading of the Nikah. Does not know Atkia's age and that Arusa Begum managed the Nikah, that he did not hear Atkia giving permission and that no deed of Nikah or paper was drawn up at or after the marriage. In reply to a question on cross-examination he said that after the death of the appellant's mother her father quarrelled with Arusa Begum, that he, the father, wanted to marry the appellant to his nephew, and that Arusa Begum was against that proposal, while Arusa herself wanted to marry her to the respondent, and he was against that proposal. This is irreconcileable with Arusa Begum's own evidence. Kazi Abdullah proves that the respondent was a servant who receives 5 rupees per month without food in the school in which witness was a teacher. The two witnesses next examined do not give any evidence of importance. Shaikh Asad was present at the Nikah, does not know what is the appellant's age or whether or not she gave permission for the Nikah, that nothing was written at the time of the Nikah, but a deed of marriage was written a long time afterwards at the request of the respondent when he came from India.

Shaikh Abdur Rahman states that he knows the respondent personally, but the appellant not personally, but by hearing, whatever that may mean; but yet he takes upon himself to say she was of age at the time of the Nikah. He is not asked what he meant by this ambiguous expression. He had no opportunity of ascertaining whether or not she was a major in any sense.

All these witnesses agree in stating two facts—first, that they were not informed at the Nikah ceremony that the appellant's father had died three or four days before; and second, that they never knew of such a ceremony being performed so soon after a parent's death.

The Kazi said he had read the Nikah ceremony over 200 times, and he never heard of such a thing.

Mussammat Amna, an emancipated slave girl, 40 years of age, stated she had been twenty-one years in the service of the Begum. She said first that the appellant was 27 years of age, and then 17 years of age; that Atkia Begum was before her (presumably before her entry into service); that at the time of the Nikah Atkia Begum was adult, and gave herself permission for her Nikah; that Abdul Moti, the Kazi, came to obtain permission. She named her three witnesses, and stated that

Ahmed Rashid was standing a considerable distance from the Purdah ; that she was near it, as were also Abdullah Rashid and Bashir Ahmad. She subsequently stated they were inside the purda, which they never themselves said. On cross-examination this woman repeated that Atkia Begum was born before her; that she was born after she came into service; was born at Mecca, and was 27 years of age. The dower was fixed, she says, at 10,000 rupees, and that a deed of dower was executed at the time of the marriage in the male apartment, and that the ceremony was performed in the female apartment.

Both these statements are inconsistent with the evidence of several other witnesses. She says, with girls, puberty is attained at the age of 13 or 14. She admitted she was present when Arusa Begum was examined in reference to this marriage.

The respondent, on being examined, stated that the appellant was 14 or 15 years of age at the date of the marriage, that she was quite fit to discharge the duties of a wife, and that he lived and had intercourse with her for three weeks; that the dower was fixed at 12,000 rupees, not 10,000 rupees as stated by the slave girl; that a dower deed was executed and put by Arusa Begum in a box; that he did not know where it is. He then proceeds to give evidence as to what took place between the appellant's father and mother and his Aunt Arusa, which must be hearsay, as he was not present. He states that a mukhtarnama was executed by the appellant in his favour, that it remained with Arusa Begum, and that he showed it to persons, but could not say whether before or after the suit. It was not registered or produced. He further said that at the time of the marriage the appellant had holes in her ears. Their Lordships do not think much weight can be attached to the evidence as to the boring of the ears, since the person on whom it was performed was not identified. On the whole, their Lordships are of opinion that having closely examined the evidence as to the appellant's having attained puberty before the date of the marriage ceremony, it is vague, unsatisfactory, and inconclusive, with the exception of the statement of Arusa Begum, which was given long after the first Subordinate Judge had pronounced his judgment. Their Lordships are strongly inclined to think that the character of the evidence is due to this, that at the time the marriage took place, it was never contemplated by any of the parties concerned that its validity would be staked upon the fact that the girl had attained puberty, and had herself consented to it. It is difficult to believe that had they done so, precautions would not have been taken to have female witnesses available, who from personal observation could have spoken with certainty as to the first fact, and by their presence behind the Purdah when the Kazi was making enquiry, could also have spoken with certainty as to the other.

The appellant was absolutely in the power of her grandmother after the death of her surviving parent. Her sister and

brother were too young to be of help to her. Her father's friends and acquaintance were kept at a distance from her. None were bidden to her marriage. The High Court were of opinion that her evidence was worthless on the ground that she was not a free agent, but was completely under the influence of her uncle. But she could not have been under his influence more than she was, at the date of her marriage, under the influence of her grandmother. And it can hardly be supposed that an old woman, who did not scorn to be a party to hurrying this friendless orphan girl into a marriage with her own nephew with such indecent haste, would scruple to exercise her influence over the girl if she needed to do so. The learned Chief Justice expressed the opinion that there was no doubt a marriage was performed as the marriage of a girl who had arrived at maturity. Their Lordships cannot concur in that view. They think this is very doubtful. And because the evidence adduced by the respondent has, they think, failed to establish clearly that which it must establish clearly to entitle him to succeed, namely, first, that the appellant had attained puberty before the date of the marriage; and, second, that she was not then merely given away in marriage by her grandmother, but had herself consented to the marriage and the performance of the ceremony, their Lordships are of opinion that the appeal should be allowed, the decree appealed from should be reversed with costs, and the decree of the Subordinate Judge of the 13th June, 1911, be restored, and they will advise His Majesty accordingly.

The respondent will pay the costs of the appeal.

In the Privy Council.

MUSAMMAT ATKIA BEGUM

v.

MUHAMMAD IBRAHIM RASHID NAWAB.

DELIVERED BY LORD ATKINSON.

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