

(1923) 04 AHC CK 0017
In the Allahabad High Court

Musammat Hajira Khatun

APPELLANT

Vs

Musammat Amina Khatun

RESPONDENT

Date of Decision : 26-04-1923

Acts Referred:

Evidence Act, 1872 — Section 108, 112

Citation : AIR 1923 All 570 : 73 Ind. Cas. 983

Hon'ble Judges : Daniels, J

Bench : Single Bench

Judgement

Daniels, J.—The question in this appeal is, whether the defendant Musammat Hajiran Khatun is the legitimate daughter of Iftikhar-ud-Din. Iftikhar-ud-Din had two wives, Musammat Rukaiyut-un-nissa and Musammat Hasan Jan alias Bivi Jan. The plaintiff is the daughter of the former, the defendant of the latter. Iftikhar-ud-Din has at different times quarrelled with and divorced both his wives. At one time, he denied the paternity of the defendant, at another time he acknowledged her.

2. It is admitted by both parties that the defendant was born on 19th September 1912. It was the case of the plaintiff that Bibi Jan was divorced in the year 1911 before the defendant was born or even conceived. The learned District Judge has rejected this case and has found as a fact that Musammat Bibi Jan was not divorced until after the birth of the defendant, apparently in December 1912. His finding, therefore, is, that the defendant was born during the continuance of a valid marriage between her mother and Iftikhar-ud-Din. He has also found that Iftikhar-ud-Din visited the defendant's mother at a time when conception could have taken place. It, therefore, follows that if the case is governed by Section 112 of the Evidence Act there was a conclusive presumption in favour of the defendant's legitimacy and the suit should have been dismissed. The learned District Judge has ignored the provisions of this Section and has gone on to discuss the case on the letters and declarations of Iftikhar-ud-Din about this time. He notices various letters and postcards of Iftikhar-ud-Din returned during the

months preceding the defendant's birth and he notes that though Iftikhar-ud-Din was on bad terms with his wife and was complaining of her temper, etc., in none of them did he disclaim the paternity of the child who was about to be born. He holds, however, that Iftikhar-ud-Din's conduct in divorcing his wife so soon after the birth of the defendant was an indication that he believed himself not to be the father and on this ground he has decreed the suit. The reasoning of the District Judge is difficult to understand, and in any case he has entirely ignored the conclusive presumption which he was bound u/s 112 of the Evidence Act to draw from the facts which he had found. It has been argued, however, on behalf of the respondent that Section 112 of the Evidence Act does not govern the case and reference has been made to a doubt expressed in Sir Roland Wilson's Anglo-Muhammadan Law, 5th Edition, paragraph 83, page 161, as to whether Section 112 is not really a Rule of substantive law rather than a Rule of evidence and, therefore, inapplicable to Muhammadans so far as it conflicts with the presumption of Muhammadan Law. The presumption raised by Muhammadan Law is that a child born within two years of the termination of a lawful marriage is legitimate, but the point relied on by the respondent is that this is a rebuttable presumption and that the District Judge must be taken to have found as a fact that the presumption has been rebutted. The remarks of Sir Roland Wilson on the subject are based originally on certain observations of Mr. Justice Mahmood in Muhammad Allahdad Khan v. Muhammad Ismail Khan 10 A. 289 : 6 Ind. Dec. 193. Mahmood, J., did not express any definite opinion on the subject but he observed that it may some day be a question of great difficulty to determine how far the provisions of the Section are to be taken as trenching upon Muhammadan Law. There is no direct authority on the point, but a similar controversy has been raised as to the presumption contained in Section 108 of the Evidence Act and it was held by a Full Bench of the High Court in Mazhar Ali v. Budh Singh 7 A. 297 : A.W.N. (1884) 333 : 4 Ind. Dec. 422 (K.B.), that this was a provision of the Law of Evidence and was applicable to Muhammadans. The same view has been taken in Mairaj Fatima v. Abdul Waheed 63 Ind. Cas. 286 : 43 A. 673 : 19 A.L.J. 713.

3. On the face of it, there appears no justification for the doubt suggested in Sir Roland Wilson's Commentary. The Evidence Act applies to all classes and to all judicial proceedings before any Court. The Rule contained in Section 112 is in fact a Rule of exclusion of evidence. Its position in Part III of the Evidence Act, which deals with the production and effect of evidence, shows that it was intended to be so regarded. It is a Rule that on certain facts being established no evidence to contradict the conclusion of legitimate descent shall be admitted except evidence of non-access. On the necessary facts being proved in a judicial proceeding such as the present suit the Court was bound to apply Section 112 of the Evidence Act and to draw a conclusion in favour of the defendant's legitimacy. Sir Roland Wilson would apparently tie at it as a provision containing an artificial definition of legitimate descent as including all persons born during the continuance of lawful wedlock or within a certain time after its termination.

Even from this point of view the difficulty cases that the supposed "rule is not absolute. Evidence, though evidence of one particular kind only, is admissible to disprove paternity. As to Sir Roland Wilson's concluding remark that the enactments which provide that in matters of status Muhammadans shall be governed by Muhammadan Law as later in date than the Evidence Act, it is sufficient to say that if it had been intended in these enactments to repeal a provision of the Evidence Act as applicable to Muhammadans this would have been done directly and not left to be inferred by a remote and precarious inference. I may note further that two learned Muhammadan Commentators, Mr. Mulla and Mr. Justice Tyabji, have differed from the view suggested by Sir Roland Wilson. The latter, in the second Edition of his Principles of Muhammadan Law, page 267, expresses the opinion that the Section was probably drafted without giving a thought to the context in which it should have been set if it is to displace the Muhammadan Law on the point but goes on to say, that the oversight can hardly be a ground for disregarding its provisions. I agree with the view taken by these writers that Section 112 of the Evidence Act applies. The result is that the appeal must succeed and I accordingly allow it with costs in all Courts including in this Court fees on the higher scale.