

(1925) 10 MAD CK 0034
In the Madras High Court

Sethu and Others

APPELLANT

Vs

Palani alias Thirumeni Thevan

RESPONDENT

Date of Decision : 20-10-1925

Acts Referred:

Evidence Act, 1872 — Section 112

Citation : 94 Ind. Cas. 535 : (1926) 50 MLJ 453

Hon'ble Judges : Waller, J;Devadoss, J

Bench : Full Bench

Judgement

Devadoss, J.—This appeal raises a novel question. The plaintiff's mother Pechiammal was first married to one Subramania Thevan in

September or October, 1903, who divorced her in May or June, 1904. She married again one Thirumeni Thevan in June or July, 1904. The

plaintiff was born to her in September, 1904. The plaintiff sues for partition of his one-third share in the property of Thirumeni Thevan. The District

Munsif held that the plaintiff was the son of Thirumeni Thevan and passed a preliminary decree in his favour. The Subordinate Judge reversed the

decree of the District Munsif holding that the plaintiff was not the legitimate son of Thirumeni Thevan. Mr. Justice Krishnan set aside the decree of

the Subordinate Judge and restored that of the District Munsif holding that the plaintiff was the son of Thirumeni Thevan. There is evidence in the

case to show that Pechiammal did not live with her first husband for any length of time but carried on an intrigue with Thirumeni Thevan in

consequence of which there were criminal proceedings and Subramania Thevan divorced her on account of her conduct. There is also evidence

that Thirumeni Thevan treated the plaintiff as his son and that at the time the plaintiff could have been conceived, his mother was having criminal

intimacy with Thirumeni Thevan.

2. The question in this case turns upon the construction of Section 112 of the Indian Evidence Act. u/s 112, if a person is born during the

continuance of a valid marriage between his mother and any man or within 280 days after the dissolution the mother remaining unmarried, he shall

be considered to be the son of his mother's husband unless it could be shown that the husband had no access to his mother at any time when he

could have been begotten. If a person is born during wedlock, the law says it is conclusive proof that he is the legitimate son of the husband of his

mother, and the onus of proving that the husband had no access to the mother at any time he could have been begotten is upon the husband. In this

case, complication is introduced by the mother marrying again. If the plaintiff's mother had not married Thirumeni Thevan, the plaintiff would be

considered to be the son of Subramania Thevan, and the onus would be upon Subramania Thevan or any other who challenges his paternity to

prove that he was not begotten by Subramania Thevan. But the plaintiff's mother married Thirumeni Thevan when she was encente and: the

plaintiff was born during the subsistence of a valid marriage between his mother and Thirumeni Thevan. According to Section 112, the plaintiff is

the son of Thirumeni Thevan, and unless and until it is proved that Thirumeni Thevan had no access to Pechiammal, the plaintiff's mother, at any

time he could have been begotten, the onus is on those who challenge his paternity. There is no proof in this case that Thirumeni Thevan had not

access to the plaintiff's mother at the time he could have been begotten. On the other hand, the evidence shows that Thirumeni Thevan was

carrying on an intrigue with Pechiammal at the time when the plaintiff could have been begotten.

3. The argument of Mr. Govindaraghava Aiyar is that, according to Hindu Law, there are only two classes of sons. Aurasa and Dattaka sons, and

to import Section 112 of the Evidence Act into the region of Hindu Law would be giving Section 112 the force of substantive law overriding the

principles of Hindu Law. The Evidence Act was enacted for the purpose. of enabling the Courts to act upon relevant evidence and to come to a

conclusion on such evidence. In order to enable the Court to decide matters satisfactorily, the law of evidence requires the Court to raise certain

presumptions and Section 112 raises one of those presumptions, and the presumption is a rebuttable one, and until it is rebutted it should be

considered conclusive proof. Before considering whether Section 112 has made an inroad into the Hindu Law or not, it is necessary to consider

whether the parties to this case are persons who are governed by the Code of Manu. No doubt the Courts have acted upon on the general

presumption that the Hindu Law applies to all persons who are not Christians, Mahomedans or persons professing any distinctive faith. Hindu

Law, strictly so called, cannot be applied to some of the castes in this Presidency. According to Hindu Law there can be no divorce and there can

be no re-marriage of widows. But according to the custom prevailing among the Maravars in Southern India, a man can divorce his wife at any

time he likes and a divorced woman as well as a widow could validly re-marry; and the children of such re-marriage are legitimate and inherit to

their parents. It is therefore difficult to see how Section 112 can be said to militate against or override any of the principles of the Hindu Law. Even

according to Manu's Code, the plaintiff would be considered the legitimate son of Thirumeni Thevan. Section 173 of Chapter IX is in these terms;

if one marries a pregnant young woman, whether pregnancy be known or unknown, the male child in her womb belongs to the bridegroom and is

called the son received with the bride. It might be said that this rule applies only to virgins. But whether it applies to virgins or to divorced women

or to widows, Manu did recognise the fact that pregnant woman could be validly married and the child who was enveritre samere at the time of the

marriage was the child of the husband. In Manu's time the levirate was prevalent. Vide Ch. IX, Section 167. In Manu's time re-marriage of

widows was prevalent though many condemned it. When the re-marriage of a widow or a divorced woman is valid according to the law of the

parties, it cannot be said that the rule which says that a person born during the subsistence of a valid marriage shall be considered to be the son of

the husband is opposed to the Hindu Law. Mr. Govindaraghava Aiyar for the appellant relied upon several English cases, *Birthwhistle v. Var dill*

(1826) 2 Cl & Fin 571, *The King v. Luffe* (1807) 103 E R 316. These cases have no application to the question to be decided in this case.

According to the Law of Scotland, the marriage between a man and a woman legitimises their issue born before marriage. But the Law of England

does not recognise any person, as legitimate who is not born during lawful wedlock or within 280 days of the dissolution of marriage either by

death or by a decree of Court. The Hindu Law is the same in this respect as the English Law.

4. Collector of Trichinopoly v. Lakkammani and Ors. (1874) 1 I.A. 292. On the grounds of public policy under the English Law a person born

during the lawful wedlock is held to be legitimate, and the onus of proving that he is illegitimate is on the person who asserts it. The question as it

has arisen in this case has not arisen in any English case. Sir James Stephen in his Book on Evidence says that he is not aware of any decided case

on the point. Taylor in his Treatise on Evidence at page 349 refers to an American case. Mr. Govindaraghava Aiyar relied upon the rule in French

Code and also upon the Roman Law on the point. I think it is unnecessary to consider What the rule is in other systems of law about the legitimacy

of a person. According to the Indian Evidence Act, all that is necessary to show that a person is legitimate is that he was born either during

wedlock or within 280 days of dissolution of the marriage. In this case there is no question of illegitimacy at all. If Thirumeni Thevan had not

married Pechiammal the plaintiff would be the legitimate son of Subramania Thevan. Thirumeni Thevan having married her he becomes the

legitimate son of Thirumeni Thevan. The law no doubt leaves to Thirumeni Thevan or any other person who challenges his paternity to prove that

Thirumeni Thevan had not access to the plaintiff's mother at any time he could have been begotten. In the case of *Ingestre v. Attorney-General*

The Times, Oct. 14, 1913 this question arose: ""In that case the petitioner's mother was twice married. She had left her first husband in 1881, and

on 16th May, 1882, he presented a petition for divorce, a decree nisi was pronounced on 10th December, 1881, and was made absolute on 20th

June, 1882. A day or two afterwards she married her second husband with whom she had co-habited since she left her first husband, and the

petitioner was born on 8th September, 1882. The evidence satisfied the Court that he was the son of the second husband, and the question of law

then arose whether he was the legitimate son of his father, for although he was born in wedlock he was conceived at a time when his parents could

not lawfully have been married."" Sir Samuel Evans, President of the Probate Division, answered the question in the affirmative. We have not been

able to get at the report of this case, but the case is discussed in 30 Law Quarterly Review page 153. The facts in that case are very similar to the

present and though the judgment in the case is not before us the conclusion arrived at by the learned President of the Probate Division is in

conformity with Section 112 of the Indian Evidence Act.

5. The decision in *Rahi and Ors. v. Govind Valad Teja* (1875) 1 Bom 97 has no application to the present case. In that case, the question was

whether a person was the illegitimate son of his father when his mother was not kept continuously by the father. As I have already observed, there

is no question of illegitimacy in this case. Either the plaintiff is the legitimate son of Subramania Thevan or the legitimate son of Thirumeni Thevan. If

his mother had not married Thirurheni Thevan, the plaintiff would be considered the legitimate son of Subramania Thevan. The words of the S.

have to be given their proper meaning. The legislature intended that if the mother married again, the child born during the subsistence of the second

marriage would be considered to be the child of the man whom the mother married again. Without going into the public policy of the law enacted in

Section 112 it is sufficient to say that, if a person is born during lawful wedlock, he is the son of the husband of his mother. It is open to those who

say that the plaintiff is not the son of Thirumeni Thevan to prove that Thirumeni Thevan could not have had access to Pechi Ammal at any time

when the plaintiff could have been begotten. If a man marries a woman not knowing that she is pregnant, he could, by showing that he could not

have had access to the woman when the pregnancy commenced, make out that the child is not his. But if a person knowing that a woman is

pregnant marries her, the child of the woman though born immediately after the marriage becomes in law his child unless the man proves that he

had no access to the woman when he could have been begotten. The plaintiff therefore is the son of Thirumeni Thevan and is entitled to a share of

his properties.

6. In the result the appeal is dismissed with costs.

Waller, J.

7. This appeal raises a question u/s 112 of the Indian Evidence Act. The facts found are these. Plaintiff's mother was married to one Subramania

Thevan in October, 1903. She was divorced in June, 1904 and married

Therumeni Thevan a month later. In September plaintiff was born to her.

The question is whether, on these facts, plaintiff is to be regarded as the legitimate son of Thirumeni Thevan. The District Munsif thought that he

should be so regarded. The Subordinate Judge held that he was the legitimate son of the first husband. Krishnan, J., agreed with the District

Munsif.

8. On the language of Section 112, I think Krishnan, J., is right. Plaintiff was born during the continuance of a valid marriage between the mother

and Thirumeni Thevan and there is no proof of non-access during the material period. The argument contra is that a child conceived during

adulterous intercourse can never become legitimate even though the parents have been validly married before its birth. That was at one time the

view of English lawyers and it appears to be still the law in France. In English Law, where as a concession, a child conceived before marriage as

the result of a non-adulterous connection was regarded as legitimate if born after the marriage of its parents, the concession was based on a fiction

which dated back the marriage to the conception. The fiction now, of course is not applicable to the fruit of an adulterous connection, for the

parents could not lawfully have married at the time of conception. That, however, is not the law of India as stated in Section 112 of the Evidence

Act. Nor is it the present law of England vide *Ingestre v. The Attorney-General* Times 1913, Oct. 14. See 30 Law Quarterly Review p. 153 a

case of which we have got no report, but which is commented on in an article in 30 Law Quarterly. Mr. Govindaraghava Aiyar argues that it is

opposed to Hindu Law but the Privy Council in *Collector of Trichinopoly v. Lakkamani and Ors.* (1874) 1 I.A. 392 decided that the English and

Hindu Law do not differ in such matter. An Indian Case has been referred to *Nicholas v. Asphar* (1896) ILR 24 C 216. There the first husband

died in November, 1841. The widow married again in December, 1841 and gave birth to a daughter in April 1842. The learned Judge found that

the daughter was the legitimate daughter of the first husband. No doubt she was born within 280 days after the first husband's death, but the S.

requires that the widow should not have married. If she does, the presumption is that the child is the legitimate child of the second husband. No

doubt, that presumption can be rebutted by proof of his non-access during the

material period. If such proof be forthcoming another presumption would arise that the child was the legitimate off spring of the first husband. But with great respect, I do not think that the learned Judge stated the law correctly when he said that ""the presumption of legitimacy arising from conception during a valid subsisting marriage is conclusive."" The date of birth and not that of conception is the test. In the case of a dissolution not only must the birth be within 280 days but the widow should further not have remarried. I agree that the appeal should be dismissed with costs.