Equivalent Citation: AIR 1924 Lah 177, 69Ind. Cas.491

IN THE HIGH COURT OF LAHORE

Decided On: 03.08.1922

Appellants: **Umar Hayat**
Vs.
Respondent: **Misri Khan and Ors.**

Hon'ble **Judges/Coram:**
Shadi Lal, C.J., and Abdul Qadir, J.

JUDGMENT

1. The sole question in dispute in this case is whether the plaintiff, Umar Hayat, who claims to be a son of Muhammad Khan deceased, is a ligitimate son of the deceased or not. Umar Hayat is a minor, and sues through his next friend, Feroz Khan, who is his maternal uncle. Muhammad Khan died on the 27th December 1906 and the plaintiff was born on the 27th February 1908, i.e., fourteen months after the death of his father. Muhammad Khan was a young man about 18 at the time of his death, and admittedly died after some illness. It is noted in the report made as to his death that he was ill for about a month before he died. He had been married to Mt. Nur Bhari, the mother of Umar Hayat, for about four years and they bad had no child before. The deceased was the owner of about 2834 kanals of land and a house and the land was mutated in the name of his widow, Mt. Nur Bhari, on the 10th April, 1907. Shortly after the birth of Umar Hayat, his mother applied for mutation of half the land in his favour, on the ground that he was the legitimate son of Muhammad Khan. The reversioners of the deceased objected to this mutation and it was not allowed. Mt. Nur Bhari died in 1910 and in 1913 the property was mutated in favour of the reversioners of Muhammad Khan. The plaintiff filed the suit out of which this second appeal has arisen on the 2nd August, 1917. The Subordinate Judge, First Class, who tried this suit, held that there was no inherent impossibility in a child being born fourteen months after the death of his father, in view of the fact that cases of the period of gestation being prolonged to that extent or even longer are recorded in books of jurisprudence. He also found that there was nothing to show that Mt. Nur Bhari was unchaste, and, coupling these facts together, he held that the plaintiff was proved to be legitimate and passed a decree in his favour for possession of the land and the house in dispute. The defendants appealed against this order and the learned District Judge accepted their appeal, holding "that the chance that the plaintiff is the son of Muhammad Khan is so indefinitely remote that it may safely be regarded as impossible." The second appeal before us is against the above decision of the lower appellate Court and has been argued at great length before us by Dr. Muhammad Iqbal. We have also heard Dr. Nand Lal for the respondents.

2. The learned Counsel for the plaintiff-appellant starts by pointing out that according to Muhammadan Law, if a child is born within two years after the dissolution of a marriage by death or divorce he is presumed to be legitimate. He contends that the above presumption, under the Muhammadan Law, is not merely a rule of evidence. Reference is made to Section 2 of the Evidence Act, and it is argued that it has not touched the presumptions arising under the personal law of the parties in matters relating to inheritance and legitimacy, etc. Section 5 (6) of the Punjab Laws Act is also referred to, as providing that Muhammadan Law, in cases where parties are Muhammadan, shall be the rule of decision in questions regarding "bastardy and family relations," among other things. Reliance is placed on certain remarks made in various text-books of Muhammadan Law, to show that

Section 112 of the Indian Evidence Act, which lays down that any person who is born within 280 days after the dissolution of marriage between his mother and any other man is presumed to be legitimate, and implies that any one born after that period may be presumed to be illegitimate, does not apply to Muhammadans. A digest of Anglo-Muhammadan Law by Sir Roland Kynvet Wilson, as revised by Mr. Abdulla Yusafally, in paragraph 83, expresses an opinion to the above effect. A book on "Principles of Muhammadan Law" by Mr. Tyabji (II Edition), page 267, is also referred to, where the author, referring to Section 112 of the Evidence Act, says that that section does not purport to lay down that legitimacy cannot be established under any other circumstances than those mentioned in the section, nor that the absence of such circumstances shall be a conclusive proof that the child is illegitimate. The learned author is of opinion that unless words to the above effect are read into the section, there is nothing to prevent Muhammadan Law having its effect in the case of a birth after the expiration of 280 days. Dr. Muhammad Iqbal, after citing the above texts, relied on certain dicta of Mr. Justice Mahmood, in two decisions of the Allahabad High Court, namely, Mazhar Ali v. Budh Singh (1884) 7 All. 297 and Muhammad Alladad Khan v. Muhammad Ismail Khan (1888) 10 All. 289. He admitted that both of these cases relate to points other than the one arising in the appeal before us, but he referred to them for the principles enunciated therein. The case in Mazhar Ali v. Budh Singh (1884) 7 All. 297 is that of a man who had been missing for more than seven years, in which it was held by Mahmood, J., that the rule of Muhammadan Law that a missing person is to be regarded as alive till the lapse of 90 years, from the date of his birth, is a rule of evidence. Dr. Muhammad Iqbal says that he is referring to this ruling only in order to show what is the proper test for judging whether a question is one of substantive law or merely a rule of evidence, and one test, suggested by Mahmood, J., is to see whether Muhammadan Jurists have treated that question as one belonging to substantive law or otherwise. As Mahmood, J., found that the rule as to the missing man had not been treated as a matter of substantive law by Muhammadan Jurists, he too regarded it as purely a rule of evidence. The casereported in Muhammad Allahdad Khan v. Muhammad Ismail Khan (1888) 10 All. 289 deals with the question of acknowledgment by a Muhammadan of another as his son and it was held by a Full Bench, which included Mr. Justice Mahmood, that the rules of Muhammadan Law governing this matter were the rules of the substantive law of inheritance. Dr. Muhammad Iqbal contends that on that analogy the rule as to legitimacy must be regarded as a rule of substantive law and that the presumption arising under it in favour of the plaintiff has not been, at all, rebutted by the evidence produced by the reversioners who question his legitimacy. He states that he is aware of the fact that the decision of the Punjab Chief Court in R]ahmat Ali v. Allahdi (1881) 1 P.R. 1881 is against him, but, for the reasons discussed above he questions the soundness of the view taken in Bahmat Ali v. Allahdi (1881) 1 P.R. 1881. That case, he goes on to say, is distinguishable as there was proof of the unchastity of the woman in the said case, while in the present case the chastity of Mt. Nur Bhari has been found to be proved by the trial Court and there is no finding to the contrary in the judgment of the lower appellate Court. Moreover the man in [Rahmat Ali v. Allahdi (1881) 1 P.R. 1881] the 1884 case was an old man, who had no children before by either of his two wives.

3. The learned Counsel cites certain passages from Wharton and Stille's Medical Jurisprudence (Volume III), pages 33 and 34, to show that in some cases pregnancy may be protracted to 344, 365 and 372 days. One case cited by Meigs is mentioned, in which gestation extended to 420 days. The authors add that "less probable cases have been reported extending over 440 days, 476 days and 500 days." The authority for this last statement is a book known as "Anomalies and Curiosities of Medicine by Gould and Pyle, page 71, which was cited in this case in the Courts below and has also been cited before us. Dr. Muhammad Iqbal bases an argument on these opinions and says that there being" no inherent physiological impossibility in the protraction of pregnancy up to the limit recognised by Muhammadan Law, a child born within that limit must be presumed to be legitimate unless its mother is shown to

be unchaste. In conclusion, he refers to a remark of the late Mr. Justice Rattigan, in P. v. P. (1911) 77 P.R. 1911 to the effect that the term of gestation has not yet been fixed by medical jurisprudence, as supporting his contention. Dr. Nand Lal, in replying to the arguments summarised above, started by saying that the finding against the appellant's legitimacy was a finding of fact and there was no ground for second appeal. He also said that the question that Muhammadan Law should govern the decision of the matter in dispute could not be raised in second appeal without a certificate. He was asked, however, to deal with the merits of the case, as we could not see much force in these objections. He urges that even if the facts of the case reported as Rahmat Ali v. Allahdi 1881) 1 P.R. 1881 were in some respects distinguishable from the present case, as argued on the other side, the principle is clearly laid down in that decision that "the rule of Muhammadan Law of the Hanfia School, fixing two years as a maximum period of gestation is a rule of evidence within the meaning of Section 2 of the Evidence Act, though also a part of the substantive Muhammadan Law, so that the effect of that section, when read with Section 5 of the Punjab Laws Act, is that the Courts are not bound by the said rule under the last named Act." He refers to another decision of the Punjab Chief Court reported as Waras Muhammad v. Ali Bakhsh (1891) 76 P.R. 1891 which is to the same effect as Rahmat Ali v. Allahdi (1881) 1 P.R. 1881 and says that there is no reason why the above two authorities, which are clearly against the appellant, should not be followed. With regard to the views expressed on this subject by the writers of certain texts on Muhammadan Law, Dr. Nand Lal points out that some other writers have expressed views to the contrary. Mulla, for instance, is of opinion that the rule given in Section 112 of the Evidence Act supersedes the rule given in Muhammadan Law (vide page 134 of Mulla's Muhammadan Law, 5th Edition). He adds that even according to an eminent Muhammadan writer like Mr. Ameer AH, the modern view among Muhammadan Jurists is that ten months is the maximum period of gestation. The following passage from Mr. Ameer Ali's book (Volume II, page 228, 4th Edition) is cited in this connection:

4. "Notwithstanding that the Shafee and Maliki doctrines are in force in Algeria, the Algerian Qazis have adopted the same view as D'Onsson, and in their decisions seem invariably to have held that ten months was the maximum term recognised by law. The Court of Algiers, by several decrees, dated the 16th of April 1861, the 13th of November, 1861, and the 1st of September, 1868, respectively, has supported and confirmed the Qazi's decisions. Although the early Henafi Jurists have laid down two years as the maximum period for gestation, the view of the Algerian Qazis is in accord with the modern rule recognised universally by Muhammadan Judges and Doctors of Law." He contends, moreover, that apart from the difference of opinion on this subject among the text-writers, the strongest point in favour of the respondents is that the onus of proving his legitimacy lay on the plaintiff, and he has not been able to discharge it.

5. After carefully considering the arguments on both sides, I think, this appeal must fail. The question whether the rule of Muhammadan Law as to the maximum period of gestation is a rule of evidence or a rule of substantive law, is, no doubt, a debatable question, on which much can be said on either side, but it seems to me that it is not possible to decide the present case simply on the presumption arising under that rule. I feel also that the passage cited above from Mr. Ameer Ali's standard work on Muhammadan Law is entitled to great weight, based as it is, on the modern view taken by Muhammadan Jurists themselves, which limits the presumption to ten months. Besides this, it is obvious that the varying maximum periods of pregnancy, given in books of medical jurisprudence, and the maximum period fixed by Muhammadan Law, relate, after all, to abnormal cases, and in each case it is for the plaintiff who alleges that there were abnormal circumstances attending his birth, to show that they existed. For instance, in the present case it was mentioned that Mt. Nur Bhari was suffering from some disease known as Kurang in the Punjabi language, which protracted the gestation but there is no medical evidence to show either that she did suffer from any such malady or that the malady would

have the effect of prolonging the pregnancy. It is admitted that no mention of her pregnancy was made by Mt. Nur Bhari throughout the mutation proceedings, when the land left by her husband was mutated in her favour. Dr. Muhammad Iqbal urges that this may have been due to unconscious pregnancy but this argument is untenable, in as much as the plaintiff produced evidence of a midwife to prove that the latter observed at the time of the death of Muhammad Khan that Mt. Nur Bhari had been with child for about a month. The question of the chastity of Mt. Nur Bhari is not beyond dispute. In the trial Court the plaintiff produced evidence that there was no suspicion of unchastity against her, while the defendant produced witnesses to prove that she had become unchaste after her husband's death. They even went the length of naming a man, called Sheru, who was her servant, as her paramour. Its is true that the Court of first instance believed the evidence for the plaintiff on this point but unfortunately the lower appellate Court has given no definite finding on the point but is apparently inclined to draw an inference of Mt. Nur Bhari's immorality from the circumstances of the case, when it observes: "It might perhaps be remarked that the birth of a child after the normal period is usually regarded as prima facie a proof of immorality of a much stronger nature than any other evidence usually procurable in such cases." It must be remembered that the deceased young man, in this case, had been married to Mt. Nur Bhari for four years without their having any issue and that he was ill for some time before bis death. Taking all the above circumstances into consideration I do not see any sufficient reason to differ from the conclusion arrived at by the learned District Judge that the legitimacy of the plaintiff is not proved.

6. There was a side issue in this case regarding an admission said to have been made by Sher Khan, defendant, as to the legitimacy of Umar Hayat (plaintiff) and it was pleaded by the latter that the sons of Sher Khan (who is now dead) were at least estopped from contesting his status, Both the Courts below have held that there is no proof of any action by Sher Khan which may be binding on his minor sons and there is no evidence that he received any quid pro quo for waiving his right to inheritance. I agree with the above finding and hold that there is no estoppel. It may be added that this part of the case has not been pressed before us by the learned Counsel for the appellants.

7. I would, therefore, dismiss this appeal with costs.