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IN THE MATTER OF THE PETITION OF BEHARI LAL.

interest, but that is a very different thing from being a person interested in the present possession of the property. It seems to me that Behari Lal is not entitled to be heard in revision, upon the ground that he is not a person concerned in the dispute as to possession. Whatever present right he has is a purely derivative one, and comes to him as agent for the widow, just as much as if there had been no compromise at all, and he had been chosen by the widow to act for her.

Two cases decided by the Calcutta High Court were cited, one that of *Laldhari Singh* v. *Sukhdeo Narain Singh* (1) and the other of *Anesh Mollah* v. *Ejaharuddi Mollah* (2). I think by both those cases the revisional jurisdiction of that Court has been extended to an extent which is beyond the practice of this Court. That, however, is unnecessary for me to decide, as they are not in point. In this case it is enough for me to say that the applicant Behari Lal has no *locus standi* in respect of the proceedings. For these reasons I reject his application.

APPELLATE CIVIL.

1902
May 1.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

TIKAM SINGH (PLAINTIFF) *v.* DHAN KUNWAR AND OTHERS (DEFENDANTS).*

Evidence—Legitimacy—Possible length to which the period of gestation may be protracted discussed.

Where a child born some 365 days after the last period at which he could have been begotten by the husband of his mother was set up as legitimate, it was *held* that although such a period of gestation was perhaps not absolutely beyond the bonds of possibility, yet there being evidence that the mother had been married to her husband for ten years without having had any children by him, and also evidence which pointed strongly to the conclusion of immorality on the part of the mother, the only reasonable finding was against the legitimacy of the child.

THE pedigree of the family to which both the plaintiff and the defendants belonged was as follows:—

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* First Appeal No. 227 of 1899 from a decree of Munshi Rajnath Prasad, Subordinate Judge of Agra, dated the 16th November 1899.

(1) (1900) I. L. R., 27 Calc., 892. (2) (1901) I. L. R., 28 Calc., 446.

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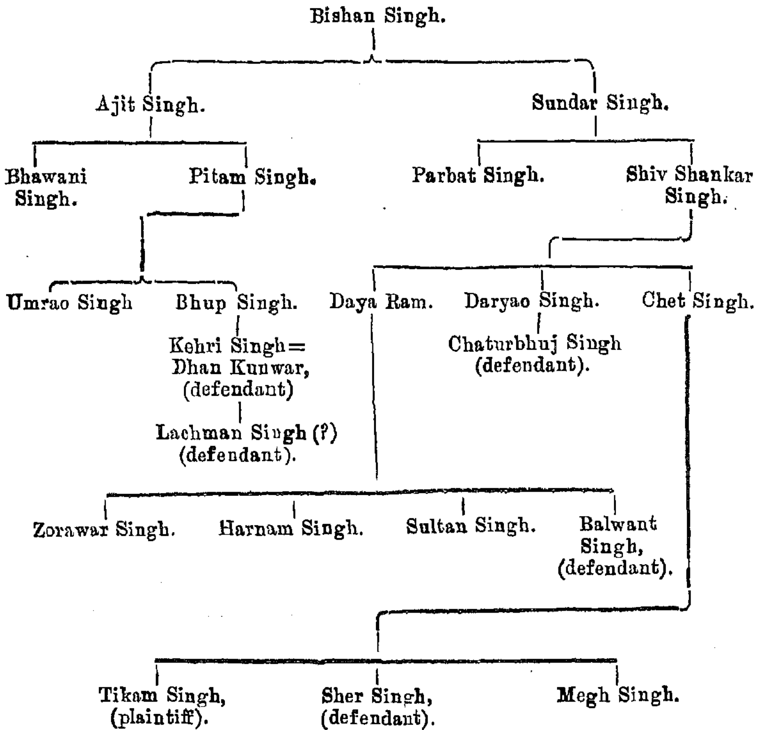

The plaintiff, Tikam Singh, in his suit asked for a declaration that the defendant Lachman Singh was not the son and heir of Kehri Singh, deceased, and that the plaintiff was one of the nearest reversionary heirs of the said Kehri Singh.

The facts on which the plaintiff's case was based were as follows:—Kehri Singh died on the 15th of May, 1890, leaving the defendant, Dhan Kunwar, his widow, him surviving. The defendant, Lachman Singh, who was the son of Dhan Kunwar, was born on the 7th of May 1891, that is, 357 days after the death of Kehri Singh. The plaintiff alleged on that ground alone that Lachman Singh could not be the son of Kehri Singh, and further alleged that the moral conduct of Dhan Kunwar during the life-time of Kehri Singh was doubtful and that after the death of Kehri Singh she had become more or less notoriously immoral. The defendant, Dhan Kunwar, had been married to Kehri Singh for ten years at the time of his death, and had had no children during that period. She stated that Lachman Singh was the son of Kehri Singh her husband, the last intercourse

with whom she alleged to have taken place some eight or ten days before his death, and she denied any intimacy with anyone else except her husband.

The Court of first instance (Subordinate Judge of Agra) found upon the medical authorities and the evidence that the interval between the death of Kheri Singh and the birth of Lachman Singh did not render it impossible for Lachman Singh to be the lawfully begotten son of Kehri Singh, and that there was no sufficient evidence that Dhan Kunwar had become unchaste before the death of her husband or that she had been guilty of misconduct subsequently. The suit was therefore dismissed.

From this decree the plaintiff appealed to the High Court.

Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *D. N. Banerji* (for whom Dr. *Satish Chandra Banerji*), for the respondents.

STANLEY, C. J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Agra dismissing the plaintiff's claim for a declaration that the defendant, Lachman Singh *alias* Mahar Singh, was not the son of one Thakur Kehri Singh, deceased. The plaintiff claimed as one of the reversionary heirs of Thakur Kehri Singh, who died on the 15th May, 1890, leaving the defendant, Thakurain Dhan Kunwar, his widow, him surviving. The defendant, Lachman Singh, who is the child of Thakurain Dhan Kunwar, was born on the 7th May, 1891, that is 357 days after the death of Thakur Kehri Singh. The plaintiff alleges that Lachman Singh is not the child of Kehri Singh, and charges that the moral conduct of Thakurain Dhan Kunwar during the life-time of her husband was doubtful, but that after his death she became immoral, and contracted improper intimacy with several persons whom we shall presently mention. The learned Subordinate Judge found that Lachman Singh was the legitimate son of Thakur Kehri Singh, and consequently dismissed the plaintiff's suit. He held upon the medical authorities and evidence that pregnancy might be protracted for the period which elapsed from the death of Kehri Singh to the birth of Lachman Singh, and that there was nothing in the evidence to lead him to suppose that Dhan Kunwar had, immediately after the

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death of her husband, become unchaste. The evidence of misconduct on the part of Dhan Kunwar adduced by the plaintiff he held to be unsatisfactory and unreliable. From this decree the plaintiff has appealed upon the ground that in view of the interval which elapsed between the death of Kehri Singh and the birth of Lachman Singh, Lachman Singh could not be the son of Kehri Singh, and that a finding to the contrary was against the weight of the evidence.

Thakurain Dhan Kunwar was cited by the Court for examination on the 4th January, 1896, at or about the time of settlement of issues, when she stated that except Lachman Singh she had no other issue by Kehri Singh, but that she had had miscarriages on two or three occasions. She says that there was coition for the last time between herself and her husband 8 or 10 days before his death, and that he was in a good state of health at that time; that she never had connection with any man except her husband, and that Lachman Singh was begotten by him. She did not tender herself for examination or cross-examination on the trial of the suit, notwithstanding that serious allegations of misconduct were made against her by several witnesses who were examined on behalf of the plaintiff.

The only question for our determination is whether or not Lachman Singh is the son of Kehri Singh. The answer to this question depends upon the weight which ought to be attached to the scientific and other evidence which has been given. According to the law in England and America, there is no period defined beyond which gestation cannot be protracted, although a period of 280 days appears to be accepted as the *legitimum tempus pariendi*. Each case in which legitimacy is contested must be decided on its own merits. Dr. Playfair in his valuable treatise on the Science and Practice of Midwifery, at p. 188, 9th edition, sums up his conclusion upon this question as follows:— "On the whole, it would hardly be safe to conclude that pregnancy can go more than three or four weeks beyond the average time. This conclusion is justified by the cases we possess in which pregnancy followed a single coitus, the longest of which was 295 days." He refers as examples of protraction of pregnancy to four instances recorded by Simpson, in which pregnancy extended

respectively to 336, 332, 319 and 324 days after the cessation of the last menstrual period; but he points out that in these, as in all cases of protracted gestation, there is the possible source of error that impregnation may have occurred just before the expected advent of the next period. Making an allowance, however, for this, he points out that even then we have a number of days much above the average, and admits that such cases of protracted pregnancy may be more common than is generally supposed. In the present case Lachman Singh was admittedly born 365 days after the last coitus with her husband alleged by his mother, that is nearly three months after the *legitimum tempus pariendi* had elapsed. Dr. Taylor in his well known work on Medical Jurisprudence, at p. 265, Vol. 2, 4th edition, writes as follows :—"In works on midwifery will be found authentic reports of cases in which gestation continued to the forty-first, forty-second, forty-third and even to the forty-fourth week. Murphy regards 301 days or forty-three weeks as the average limit of gestation (Obstet. Rep., p. 4). Lee met with a case in which he had no doubt that the pregnancy lasted 286 days, the labour did not take place until forty-one weeks after the departure of the husband of the lady for the West Indies (Med. Gaz., Vol. 31, p. 917). William Hunter met with two instances in which gestation was protracted until the forty-second week. Montgomery met with a case in which delivery did not ensue until between the forty-second and forty-fourth weeks (Med. Gaz., Vol. 19, p. 646)." And again he writes :—"There is no doubt a limit to gestation, but it is not in our power to fix it, hence we find obstetric writers of repute adopting periods which have no point of agreement among themselves. Some stop short at 280 days, others like Reid fix the maximum yet known at 293 days. Murphy allows from his experience at least 324 days, and Meigs considers that gestation may be continued to twelve months or 365 days." Dr. Lyon in his work on Medical Jurisprudence for India sums up the matter thus :—"On the whole, therefore, as regards the question what is the longest period which, in natural human gestation, may intervene between coitus and delivery—the form which the question under consideration assumes for forensic purposes—it may be stated that—

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(1) it may be regarded as proved that this may be 296 days;

(2) most authorities agree in considering that the interval may be as long as 44 weeks or 308 days: indeed in the Gardner Peerage case several eminent obstetricians gave it as their opinion that the interval might extend to, at any rate, 311 days;

(3) some authorities consider that the interval may extend to the forty-sixth week—315 to 322 days."

These then are the limits assigned by the best medical experience. We gather from the foregoing that the utmost which can be said is that it is not outside the bounds of possibility that gestation may be protracted for a period of 365 days, but that so protracted a period of gestation is in the highest degree improbable. A Miss Yerbury, who is an M. D., and who has been in charge of the Maternity Hospital at Agra for nine years, was examined in this case, and she expressed her opinion that the longest period of gestation is from 300 to 308 days. Dr. Wilcocks, Civil Surgeon of Agra, stated that the longest periods of gestation that have been admitted in America were 317 and 308 days, and that the ordinary period of gestation is 278 days. He would say that any period exceeding 317 days for gestation was impossible. Dr. Amullya Ratan Bysack, who is an Assistant Surgeon, and has been a lecturer in the Medical School at Agra from the year 1888, deposed that to his knowledge, personal or acquired by study, it is not possible that a legitimate child can be born to a woman 350 days subsequent to the death of her husband. On the other hand, two native gentlemen who practice as physicians have been examined on behalf of the defendant, and have deposed that pregnancy may be extended for more than a period of 12 months. One of them, Gauri Shankar, says that he treated a woman whose pregnancy lasted for more than 12 months, namely, the wife of one Hira Lal, who gave birth to a child 14 months after her pregnancy. He also mentioned the case of the wife of one Ude Kachhi, who was under his treatment, and also remained pregnant for more than twelve months. In cross-examination he states his means of knowledge in the case of the wife of Hira Lal as follows:—

"I came to know from the woman that the child had been born in 14 months," and then "I came to know from the child's father that it had been born in 14 months from the day of conception." In the other case he appears to have derived his knowledge from a statement made by the father. Little weight can be attached to examples of protracted pregnancy so loosely verified. The other witness, one Khurshaid Ali, said that a child might be born "after it had remained in the womb *for two years or more,*" and that one Thakur Daryao Singh, living in the district of Aligarh, had a son after one year and nine months. He also mentioned other instances of protracted pregnancy. In cross-examination he said that he came to know from Daryao Singh that his wife was pregnant for 12 months, and that he had mentioned this fact to him 16 years ago. He did not know the name of the Kachhi whom he referred to as having had a son after 13 months, and he admitted that the mother was not under his treatment. In another case which he gave as an illustration of protracted gestation, he says that it was through the mother that he had ascertained that she had been with child for 14 months. Such evidence as this appears to us to be of little value, if it is not absolutely worthless. Now having regard to the fact that no child was born alive to Kehri Singh by his wife Takurain Dhan Kunwar, and to the fact that Lachman Singh was not born until the period of 357 days had elapsed from the death of Kehri Singh, and 365 days at least from the last coitus, the story told by Dhan Kunwar appears to us highly improbable.

The case, however, does not rest with the medical evidence. Positive charges of misconduct have been made against Dhan Kunwar by the plaintiff. She is accused of having misconducted herself with no less than four persons who were in her service from time to time, namely, Durga Prasad, Bhulan Singh, Nasrat, and Bairi Singh. The defendants did not examine any of these persons. Nasrat was in Court at the trial, but was not examined. One Chameli, who had been in the service of Kehri Singh, and was also his mistress, deposed that she remained in the service of Thakurain for five or six years after the death of Kehri Singh. She says that the Thakurain had the usual monthly course twice after the death of Kehri Singh. This evidence was given with

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the object of showing that at the time of her husband's death she was not pregnant. She also said that she, at the bidding of the Thakurain, used to invite the four persons whom we have mentioned to the room of the Thakurain, and that they used to stay with her in that room. Her suggestion is that these persons had improper intimacy with the Thakurain, and thus Lachman Singh is the son of one of them. She is corroborated in her story by a witness Hardeo, who deposed that Bhulan Singh, Durga Prasad and Nasrat slept at night in the Thakurain's house. If the evidence of these witnesses be reliable, it is difficult to believe in the legitimacy of the defendant Lachman Singh. The learned Subordinate Judge discredited the evidence of Chameli and did not believe her statements, saying that she was herself a half prostitute and a dismissed servant of the Thakurain. If she was a woman of a loose character there is this to be said, that the Thakurain, retained a woman of such character in her service for a number of years, both before and after her husband's death, which would not be to her credit. The Subordinate Judge seems to have considered that the evidence of Chameli, that the four persons named by her were permitted to go inside the zanana, was true, for he excuses this by saying that "her (Dhan Kunwar's) husband being dead and there being no male member in her family to look after her affairs, and the collateral heirs of her husband not being on good terms with her, it is not suspicious if she being in greater need of their services than in the life-time of her husband, permitted them to come inside the zanana quarters." Two servants of the Thakurain, namely, Musammat Naulo and Musammat Kesar, contradicted the evidence of Chameli in some particulars, but we are not disposed to attach much importance to their evidence. A witness of the name of Kundan, who is in the service of the Thakurain, denied that any male person was allowed to go inside the female apartments. It is a remarkable thing, however, that not one of the four persons who were mentioned by Chameli as having visited and stayed at night with the Thakurain in her room was examined on behalf of defendants to deny the allegations made against them. Nasrat was present in Court, as we have said, and yet he was not called as a witness. Besides this

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the Thakurain herself did not venture into the witness-box to deny the charges so made against her. It is true that she was examined by the Court at the time of the settlement of the issues, and that she then denied that she had improper familiarity with any person. This was, however, before the evidence of Chameli had been given, and she was not and could not be subjected to any cross-examination. It is difficult to understand how it came about, if her case be true, that she did not go into the witness-box and categorically deny the charges made by Chameli, and that she did not produce the persons who were alleged to be her paramours to corroborate her in her denial of misconduct.

The question for us to determine is not whether it is within the bounds of possibility that Lachman Singh was the child of Kehri Singh, but whether, upon the evidence, and having regard to the probabilities, the reasonable finding upon the issue of legitimacy is one in favour of the defendants. Now we have the fact that the defendant, Dhan Kunwar, had been married to her husband for ten years and had not had any child; that the defendant Lachman Singh was born 357 days after the death of Kehri Singh, and 365 days at least after the last coitus, that is, nearly three months after the ordinary period of gestation had elapsed; that grave charges of immorality were made against the Thakurain, which were not refuted by her or by the parties implicated. In the face of these facts it is difficult to find any ground for accepting the truth of the defendant's strange and improbable story. We have come to the conclusion that the finding of the lower Court is entirely erroneous, and that the only finding consistent with the evidence and the probabilities of the case is that the defendant Lachman Singh is not the son of Kehri Singh. The evidence leads irresistibly to this conclusion. We accordingly so find, allow the appeal, set aside the decree of the lower Court, and declare that the defendant Lachman Singh is not the son and heir of Thakur Kehri Singh, deceased, and that the plaintiff is one of the nearest reversionary heirs of Kehri Singh. The defendants Thakurain Dhan Kunwar and Lachman Singh must pay the costs of this appeal in this Court and also the costs of the suit in the lower Court.

Appeal decreed.