

at "railway risk," but at "owner's risk." In the present case, however, it appears that delivery was not necessary to the completion of the sale, and we consider that the sale was complete, in accordance with the provisions of section 83, as soon as the goods had been delivered to the railway company for despatch. The lower appellate court considers that the goods were not appropriated for the purpose of the agreement so long as the defendants retained a right of disposal, which they did in the present case. The learned District Judge has applied rules of English law regarding the right of disposal which have no application in India, where the case has to be decided in accordance with the provisions of the Indian Contract Act.

On these findings, we accept the appeal and restore the decree of the court of first instance. The appeal is allowed with costs.

Before Mr. Justice Daniels and Mr. Justice King.

SIBT MUHAMMAD (PLAINTIFF) *v.* MUHAMMAD
HAMEED AND OTHERS (DEFENDANTS).*

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*Act No. I of 1872 (Indian Evidence Act), section 112—
Muhammadian law—Legitimacy—Presumption—Child
born within six months of the date of marriage of parents.*

Held, on a question whether a Muhammadian child born within six months of the marriage of its parents was to be considered legitimate, that section 112 of the Indian Evidence Act, 1872, applied, and the child was legitimate. *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgement of the Court.

* Second Appeal No. 1394 of 1923, from a decree of A. M. de B. Hamilton, District Judge of Moradabad, dated the 1st of August, 1923, reversing a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 3rd of April, 1922.

(1) (1888) I.L.R., 10 All., 289 (339).

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Mr. *Mahmud-ullah*, for the appellant.

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Pandit *Ambika Prasad Pandey* (for *Syed Raza Ali*), for the respondents.

DANIELS and KING, JJ. :—The question for determination in this second appeal is whether Musammat Hasina Khatun is the legitimate daughter of her father Sibt Ali.

The finding of the court of first instance and of the first appellate court is that Musammat Hasina Khatun was born during the continuance of a valid marriage between her mother Musammat Sakina Khatun and her father Sibt Ali, but her birth was within six months of the date of her parents' marriage.

If the question of Musammat Hasina's legitimacy is to be determined in accordance with Muhammadan law, it must be held that she was illegitimate. The rule of Muhammadan law is stated in Wilson's Anglo-Muhammadan law, fifth edition, at page 159, as follows :—

“ It is conclusively presumed that a child born within less than six months after the marriage of the mother cannot have been begotten by her husband in lawful wedlock ”.

If, on the other hand, the daughter's legitimacy is to be determined in accordance with section 112 of the Evidence Act, she must be held to be legitimate. Section 112 says :—

“ The fact that any person was born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten ”.

In the present case no question of non-access arises, so, if the case is governed by section 112 of the Evidence Act, Musammat Hasina Khatun is certainly

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legitimate. The question, therefore, is whether her legitimacy is to be governed by Muhammadan law or by section 112 of the Evidence Act.

Under section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887, questions regarding inheritance or marriage are to be decided according to the Muhammadan law, where the parties are Muhammadans, "except in so far as such law has, by legislative enactment, been altered or abolished". If, therefore, it is held that section 112 alters the rule of Muhammadan law, then the decision must be in accordance with section 112 and not according to pure Muhammadan law.

The fact that section 112 does conflict with Muhammadan law is undeniable, but doubts have been expressed whether that section was ever intended to override the rules of the Muhammadan law. The difficulty was recognized by Mr. Justice MAHMOOD in the case of *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1). He refers to a peculiarity of the English law that it does not concern itself with the conception, but considers a child legitimate who is born of parents married before the time of his birth, though they were unmarried when he was begotten. He goes on to say :—

"The peculiarity of the English law has no doubt been imported into India by section 112 of the Indian Evidence Act, and it may some day be a question of great difficulty to determine how far the provisions of that section are to be taken as trenching upon the Muhammadan law of marriage, parentage, legitimacy and inheritance, which departments of law under other statutory provisions are to be adopted as the rule of decision by the courts in British India."

Mr. Justice MAHMOOD did not express his own opinion regarding the solution of this difficulty, since

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it was unnecessary for him to do so for the decision of that case.

Although that judgement was pronounced so long ago as 1888, the question how far section 112 of the Evidence Act is to be taken as overriding the rules of Muhammadan law does not seem to have been determined in any reported decision.

Sir Roland Wilson in his treatise on Anglo-Muhammadan law, fifth edition, at page 161, expresses the opinion that section 112 of the Indian Evidence Act is really, notwithstanding its place in the statute book, a rule of substantive marriage law rather than of evidence, and as such has no application to Muhammadans, so far as it conflicts with the Muhammadan rule that a child born within six months after the marriage of its parents is not legitimate.

This view has been dissented from by two other learned commentators on Muhammadan law, namely, Mr. Mulla and Mr. Tyabji. The latter in his "Principles of Muhammadan law," second edition, at page 267, after discussing the question at considerable length, comes to the following conclusion:—

"It is difficult to resist the conclusion that the Indian Evidence Act, section 112, was drafted without giving a thought to the frame-work in which it would have to be set, if it is to displace the Muhammadan law on the same point. But this oversight can hardly be a ground for disregarding its provisions."

We agree with this view. Section 112 of the Evidence Act applies by its terms to all classes of persons in British India and no exception is made in favour of Muhammadans. If it had been intended that the provisions of section 112 should not apply to Muhammadans, we should certainly expect to find a clear proviso to this effect. This course has been

followed in other enactments, when general provisions of law were not intended to affect the rules of Muhammadan law. For instance, chapter VII of the Transfer of Property Act, 1882, lays down the general rules relating to gifts, but section 129, at the end of the chapter, expressly states that "nothing in this chapter shall be deemed to affect any rule of Muhammadan law". So if the legislature had intended that the provisions of section 112 of the Evidence Act should not apply to Muhammadans, or should not affect the rules of Muhammadan law, this intention should have been clearly expressed. Section 112 is perfectly clear in its terms and we are not entitled to refuse to give effect to its provisions merely on the ground that such provisions are out of place in the Evidence Act and should have been included in the department of family law, or on the ground that the effect of these provisions in their application to Muhammadan law was unforeseen, or would be undesirable.

In our view we are bound to give effect to the clear provisions of section 112, although they conflict with the rules of Muhammadan law.

A similar view was taken in an unreported decision of this Court by one of us in second appeal No. 1807 of 1921, *Musammat Hajira Khatun v. Amina Khatun*. We agree with the view taken in that case, namely, that the question of legitimacy must be decided in accordance with section 112 of the Evidence Act. We, therefore, hold that Musammat Hasina Khatun was a legitimate daughter of her father and accordingly dismiss the appeal with costs.

Appeal dismissed.

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