

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Fforde.

PAL SINGH, ETC. (PLAINTIFFS) Appellants

versus

JAGIR (DEFENDANT) Respondent.

Civil Appeal No. 1024 of 1922.

Indian Evidence Act, I of 1872, section 112—Child of a woman whose first husband died 279 days before its birth, but who remarried, and the child was born during the continuance of the second marriage.

The question for decision was the paternity of Jagir, the defendant-respondent. He was born of *Mst. H. K.* on 17th October 1919, *i.e.*, 279 days after the 10th January 1919, the date of the death of her husband *H. S.*—*Mst. H. K.* entered into a second marriage on the 25th February 1919, with one *S. S.* and Jagir was born during the continuance of that marriage.

Held, that as section 112 of the Indian Evidence Act, refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child, the presumption is that *S. S.*, the second husband of *Mst. H. K.*, was the father of Jagir.

Palani v. Sethu (1), followed.

Second appeal from the decree of Lt.-Col. F. C. Nicolas, District Judge, Amritsar, dated the 3rd April 1922, reversing that of Mirza Zahur-ud-Din, Munsif, 1st class, Amritsar, dated the 21st June 1921, and dismissing the plaintiffs' suit.

BIHARI LAL, for Appellants.

K. J. RUSTOMJI, for Respondent.

JUDGMENT.

BROADWAY J.

BROADWAY J.—The question for determination in this second appeal is as to the paternity of one Jagir. It appears that his mother *Mussammat Harnam Kaur* had been married to *Hari Singh*. *Hari Singh* died on the 10th January 1919 and Jagir was born of *Mussammat Harnam Kaur* on the 17th October 1919, that is, 279 days after *Hari Singh's*

death. On these facts Jagir claims to be the son of Hari Singh. His claim was decreed on appeal by the learned District Judge of Amritsar. The judgment of the learned District Judge shows that in coming to his conclusion he was clearly influenced by the provisions of section 112 of the Indian Evidence Act, but in applying the provisions of that section the learned District Judge omitted to see that the presumption raised by that section was, in the present case, against Hari Singh being the father of Jagir. For it has also been found as a fact that after the death of Hari Singh *Mussammat* Harnam Kaur married Sohan Singh, a cousin of Hari Singh, by *chadar undazi* on the 25th February 1919. The presumption, therefore, under section 112 of the Indian Evidence Act, was that Sohan Singh was the father of Jagir. Evidence appears to have been led to prove that Hari Singh had access to *Mussammat* Harnam Kaur at a time when Jagir could have been conceived, but this evidence was on the facts of this case wholly irrelevant. Mr. Rustomji for the respondent referred to *Palani v. Sethu* (1), but that authority is clearly against him. It was pointed out by Mr. Justice Krishnan in that case that section 112 of the Evidence Act refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child—a view in which I thoroughly concur.

In my opinion, the view taken by the trial Court was correct, and I would therefore accept this appeal with costs and setting aside the decree of the lower appellate Court restore that of the Subordinate Judge.

EFFORDE J.—I agree.

Appeal accepted.

EFFORDE J.

C. H. O.

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