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It is contended on her behalf that nothing more is established against her beyond this—that the two girls, Dhanauli and Gidauli, both of them under sixteen years of age, were wandering about and found their way to the village where Musammat Jasauli lives—Both girls admit that they had run away from their houses—and that they remained nearly one or two days in Musammat Jasauli's house; and that these facts are not enough to bring the Musammat within the four corners of section 366 and do not justify the sentence passed; at the outside the offence is merely a technical offence. I have considered all these points, also the evidence on the record and I consider that the view taken by the learned Sessions Judge is justified by the evidence on the record. I have been referred to the case of *Queen* v. *Gunder Singh* (1). With every respect to the learned Judges who decided that case, I find myself unable to agree with the view they took; there is the further element in this case that Musammat Jasauli belongs to the well-known caste of Naiks in Kumaun. I cannot think that she took these two girls out of charity. She made no report to the padhan or the patwari. I dismiss the appeal.

Appeal dismissed.

APPELLATE CIVIL.

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February 15.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

BELA RANI AND ANOTHER (PLAINTIFFS) *v.* MAHABIR SINGH AND OTHERS (DEFENDANTS.)*

Act No. 1 *of* 1872 (*Indian Evidence Act*), *sections* 11 *and* 32—*Evidence—Admissibility—Statements of deceased persons.*

Held that if the terms of a deposition made by a person since deceased do not fall within the provisions of section 32 of the Indian Evidence Act, 1872, the provisions of section 11 of the Act will not avail to make such deposition evidence.

THIS was a suit for possession of immovable property. One Beni Ram, who died in 1866, owned the property in dispute. He was succeeded by his wife, Musammat Mathuri, who died in 1878, and was succeeded by her daughter, Musammat Dasodri. After her death the plaintiffs, the transferees of the rights of the reversioners, brought this suit for possession of the property as against the defendants who were the transferees (or their

* First Appeal No. 338 of 1910 from a decree of Achal Behari, Subordinate Judge of Banda, dated the 17th of June, 1910.

(1) (1865) 5 W. R., Cr. R., 6.

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representatives) of Musammat Dasodri. The main defence was that the Musammat died more than 12 years prior to the institution of the suit, which was accordingly barred by limitation. The Subordinate Judge dismissed the suit as barred by limitation. The plaintiffs appealed.

The Hon'ble Dr. *Sundar Lal*, for the appellants.

Munshi *Damodar Das*, for the respondents.

RICHARDS, C. J.—This appeal arises out of a suit for possession of immovable property. The property originally belonged to one Beni Ram who died in the year 1866. He was succeeded by his wife, Musammat Mathuri, who died in the year 1878. After her death, Musammat Dasodri, daughter of Beni Ram, was in possession. The plaintiffs are more or less speculative purchasers from the persons who would be entitled to the property on the death of Musammat Dasodri, assuming that she had made no valid transfer. The defendants are transferees or the representatives of Musammat Dasodri. The main defence was that the suit was barred by limitation; and the learned Subordinate Judge found that the suit was barred.

It is common ground that the right to bring the present suit arose on the death of Musammat Dasodri. It is also admitted that neither the plaintiffs, nor their predecessors in title, have ever been in possession of the property in dispute. There can be no doubt, therefore, that it lay upon the plaintiffs to establish their case and to show that Musammat Dasodri died within the twelve years before the institution of the suit. I also think that it is very just and equitable that the plaintiffs should be held to strict proof. A very long time has elapsed since the transfers were made. The reversioners did not attempt themselves to challenge the transfer, and it is not easy for the transferees to bring forward proof of legal necessity. The suit was instituted on the 4th of March, 1910. In the plaint it was alleged that Musammat Dasodri died on the 28th of March, 1898. In appeal here the date of her death is alleged to be the 16th of March, 1898. It will, therefore, appear that on the plaintiff's own case the suit was not instituted until the period of limitation had almost expired.

The learned Subordinate Judge considered that the oral evidence adduced by the plaintiffs was almost worthless, and in this I quite agree. It is, however, contended on behalf of the appellants that

there was certain documentary evidence to which great weight should be attached. It appears that on the death of Musammat Dasodri applications were made for mutation of names in respect of some of the property in the possession of which she had been. These applications were supported by depositions of the reversioners, two of whom were sons of the Musammat, and the date of her death was stated to be the 16th of March, 1898. There is no doubt that, if these depositions are admissible in evidence, they supported the case of the plaintiffs. They are not necessarily conclusive, but, having regard to the date at which they were made and the persons who made them they would be important. The persons who made the depositions are dead and the depositions accordingly are simply the statements of relevant facts by persons who are dead. Such statements are not relevant facts, unless they come under some one or more of the sub-sections of section 32 of the Evidence Act. It has to be admitted that under the circumstances of the present case the depositions in question are not admissible under section 32. The learned advocate for the appellants ingeniously argues that while the depositions cannot be admitted under the provisions of section 32 nevertheless the fact that these persons made the statement that Musammat Dasodri died on the 16th of March, 1898, makes it highly probable that she did die on that particular date and that, therefore, the depositions are admissible under section 11 of the Evidence Act. In my opinion this argument is not sound. I think it impossible to hold that a statement of a relevant fact which would be inadmissible under section 32 could be admissible under section 11. If these depositions are excluded, there is practically no evidence as to the actual date of the death of Musammat Dasodri, and I think, that the learned Subordinate Judge was correct in holding that the plaintiffs had failed to prove their case. I would accordingly dismiss the appeal with costs.

BANERJI, J.—I am of the same opinion. The question is whether Musammat Dasodri died at some time subsequent to the 4th of March, 1898. If it cannot be established that she died subsequently to that date, the claim is clearly time barred. The oral evidence adduced to prove the date of her death is unreliable, though not for the reasons given by the learned Subordinate Judge, which are

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clearly erroneous. Unless, therefore, the statements made in the mutation case referred to in the judgement of the learned Chief Justice, can be admitted in evidence, the allegation of the plaintiff as to the date of Musammat Dasodri's death must be held not to have been proved.

I agree with the learned Chief Justice that the statements relied on cannot be admitted in evidence. They are the statements of persons who are dead. Statements of such persons can only be admitted under sections 32 and 33 of the Evidence Act. It is conceded that the statements in question do not come within the purview of those sections and are, therefore, not admissible under those sections, but it is contended that they are admissible under section 11 as being facts which make the existence or non-existence of a fact in issue highly probable. The making of such a statement is, no doubt, a fact which would make the fact in issue highly probable and, as such, might be admissible in evidence, but it must be proved before it can be admitted. The terms of section 11 are, it is true, wide, but they must be read subject to the other sections of the Act, and therefore the fact relied on must be proved in accordance with the provisions of the Act. If that fact is a statement made by a person who is not called or cannot be called, the statement cannot be admitted unless it comes within the purview of subsequent sections of the Act, for example, sections 32 and 33. That such was the intention of the Legislature is manifest from the elaborate provisions of the Act as to relevancy of evidence. Surely it cannot be said that the statement of a person who said to another person that he had seen a murder committed can be admitted unless the person who made the statement is called.

As I have pointed out above, a statement made by a person who is not produced as a witness is only admissible in the exceptional cases provided for by the Evidence Act and in no other cases. The statements which the plaintiffs ask us to admit are clearly not statements which come within the exceptional provisions of the Act: they are, therefore, not admissible, and we must hold that the plaintiffs have failed to prove that their claim is within time. I agree in dismissing the appeal.

BY THE COURT:—The appeal is dismissed with costs.

Appeal dismissed.