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The result, therefore, is that we allow the appeal in part and modify the decree of the lower court in so far that the defendants will be made liable for the total rental for the years 1321 Fasli to 1338 Fasli and will be allowed collection charges at the rate of 10 per cent. In all other respects the decree of the lower court will stand.

In the circumstances, we direct that the parties shall bear their respective costs in this Court.

Srivastava and Nanavutty, JJ.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice H. G. Smith

MUSAMMAT NEKSI KUAR (PLAINTIFF-APPELLANT) *v.* MUSAMMAT JWALA KUAR AND OTHERS (DEFENDANTS-RESPONDENTS.)*

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Hindu Law—Joint Hindu family—Survivorship—Two brothers dying in a conflagration—Widow of one brother claiming that her husband survived his brother—No sufficient evidence that plaintiff's husband died after his brother—Burden of proof—Presumption about younger brother dying after the elder brother.

Where a Hindu widow brings a suit for possession of certain property on the allegation that her husband and his brother constituted a joint Hindu family governed by the *Mitakshara*, that a fire broke out in the residential houses of the family, that in this conflagration the two brothers and their children and others perished but that her husband died after his brother and thus the joint family property descended on him by survivorship and that after her husband's death she became the sole owner of that property but on the evidence it is impossible to say whether her husband survived his brother or not and the question is left quite undetermined and nobody knows which of the two brothers died first or whether they died simultaneously, the suit must be dismissed as there is no presumption that the plaintiff's husband survived his brother and the burden lay on the plaintiff to prove her case.

*First Civil Appeal No. 68 of 1932, against the decree of Sheikh Mohammad Baqar, Additional Subordinate Judge of Sitapur, dated the 2nd of July, 1932.

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The plaintiff is not a member of the joint Hindu family to which her husband and his brother belonged, she is not a representative of her husband's family and she can only claim, as the heir of her husband, any property which may have devolved upon him before his death. *Yeknath Narayan* v. *Laxmibai* (1), *Gopal Chandra Deb Goswami* v. *Padmapani Goswami* (2), *Wing* v. *Angrave* (3), *Lal Chand Marwari* v. *Ramrup Gir* (4), and *Achal Ram* v. *Udai Partab Addiya Dat Singh* (5), referred to.

Messrs. *Piarey Lal Banerji* and *Akhtar Husain*, for the appellant.

Messrs. *A. P. Sen*, *Ram Bharose Lal*, *Bhagwati Nath*, *Bhagwati Prasad*, *P. L. Varma* and *Suraj Sahai*, for the respondents.

NANAVUTTY, J.:—This is an appeal filed by Musammat Neksi Kuar, plaintiff, against the judgment and decree of the Court of the Additional Subordinate Judge of Sitapur dismissing her suit. The plaintiff, Musammat Neksi Kuar, has brought this suit for possession over certain moveable and immoveable property set forth in the lists attached to her plaint on the allegations that she is the widow of Kunwar Hakim Singh, that her husband and his brother Kunwar Bachu Singh constituted a joint Hindu family governed by the *mitakshara*, that on the afternoon of the 28th of April, 1930, a fire broke out in the residential house of the family of Bachu Singh and Hakim Singh in village Dalupur, tahsil Chabramau, in the district of Farrukhabad, while the plaintiff was at her father's house, that in this conflagration the two brothers and their children and others perished but that Hakim Singh, the husband of the plaintiff, died after his brother Bachu Singh, and that the plaintiff thus became the sole owner of the assets of her husband Hakim Singh. It is as the widow of Hakim Singh to whom she alleges that the joint family property descended by survivorship that the plaintiff has brought the present suit.

(1) (1922) I.L.R., 47 Bom., 37.
(2) (1912) 18 I.C., 814.
(3) (1860) E.R., H. of L. Vol. 11, p. 397.
(4) (1925) L.R., 53 I.A., 24.
(5) (1883) L.R., 11 I.A., 51.

The defendants raised several pleas but it was agreed in the trial court between the parties and their counsel that the first issue, namely:

"Did Hakim Singh survive Bachu Singh?"

should be decided as a preliminary issue, and that if the plaintiff failed to secure a finding on this issue in her favour then her whole suit was to stand dismissed. The learned Subordinate Judge acceded to this wish of the parties as it meant curtailment of their expenses and also saved much valuable time of the Court.

Nanavutty, J.

Eight witnesses were examined by the plaintiff on this first issue and four were examined on behalf of the defendants. The learned Subordinate Judge found that both the brothers Bachu Singh and Hakim Singh died of suffocation in the same room to the south of their house, no one knowing as to who died first. He held accordingly that the plaintiff had failed to prove that Hakim Singh survived Bachu Singh and he accordingly dismissed the plaintiff's suit. Dissatisfied with the judgment and decree of the lower court the plaintiff has filed the present appeal.

The principal point for determination in this appeal is whether Hakim Singh, the husband of the plaintiff, survived his brother Bachu Singh even for a very short time so as to enable his widow Musammat Neksi Kuar to assert that under the *mitakshara* the entire joint family property devolved upon him by survivorship and thus justified the plaintiff, as the heir of her husband in claiming that property for her lifetime.

I will first proceed to examine the oral evidence adduced by the plaintiff to prove her contention that Hakim Singh survived his brother Bachu Singh.

P. W. 1 Pandit Har Narain is the Sub-Assistant Surgeon of the Chabramau Dispensary. He has deposed that he visited the house of Bachu Singh at 12.30 p.m. on the day the fire broke out as Bachu Singh's son and daughter were suffering from fever. He was not

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actually present when the fire broke out in village Dalupur and his evidence does not help one to decide whether the two brothers Bachu Singh and Hakim Singh died at the same time or which brother survived the other. No indirect help even can be secured from the evidence of this witness to decide this first issue. The exact time of the day deposed to by this witness with reference to various events is, on his own showing, a mere matter of guess work and after the lapse of two years no medical practitioner with any reputation to lose would depose with such accuracy from mere memory as to the exact hour of the day when different events happened. The learned Subordinate Judge who had the inestimable advantage of hearing the evidence of this witness and of noting his demeanour in the witness-box has rejected his testimony as false, and I have not the slightest hesitation in accepting the estimate formed of this witness's testimony by the learned trial Judge. The register of out-door patients kept by this witness itself gives the lie to his sworn testimony. When confronted with the entries in his register the Sub-Assistant Surgeon has deposed in cross-examination as follows:

> "The position of the numbers (against the names of Bachu Singh's children) indicates that these patients must have visited the hospital at about 9 a.m."

If Bachu Singh's children were actually taken to the dispensary at Chabramau at about 9 a.m. on the 28th of April, 1930, the very day the fire broke out, then the story, that the Sub-Assistant Surgeon visited them at their house three hours later the same day, seems to me highly improbable, and has been rightly rejected by the trial court. This witness has also deposed that when he visited the house of Bachu Singh on the 28th of April, the defendant Mathura Singh was also present there. He was asked to identify Mathura Singh who

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was present in the lower court with six or seven other persons but he failed to do so, thereby clearly showing that he is a tutored and hired witness on whose testimony no reliance can be placed.

P. W. 3, Kandhai Singh, is a Thakur zamindar of Bewar in the district of Mainpuri. He has deposed that he was called by Bachu Singh to come to the latter's house on the day the fire broke out in order to negotiate the marriage of Bachu Singh's daughter with the son of one Major Jugraj Singh. In cross-examination this witness shame-facedly admitted that he did not know how many brothers and sons Major Jugraj Singh had, and that he only knew of one son, and about him too he could not say if he had been married or not or where he had been married. He further admitted in cross-examination that Tej Singh the brother of the plaintiff was the person who was looking after the case of the plaintiff and that this brother used to purchase cloth from the witness. If the sole reason for this witness's presence in village Dalupur, when his own home is miles away in another district, is proved to be false then no weight whatsoever can be attached to his evidence concerning the tragedy in which Bachu Singh and his brother Hakim Singh lost their lives, for the simple reason that he was never present at the time of the occurrence. I entirely agree with the learned Subordinate Judge who has discredited the evidence of this witness and has given good reasons for doing so.

Nanavutty, J.

P. W. 4, Babu Lal, is a Vaish by caste and a pound-keeper of village Bewar in the district of Mainpuri. It is difficult to understand what part or lot he had in the negotiations for the alleged marriage between Bachu Singh's daughter with the son of Major Jugraj Singh which Kandhai Singh (P. W. 3), was said to be trying to bring about, and why he should have gone from his village in Mainpuri to Dalupur with Kandhai Singh. One may well ask about him in the words of Moliere:

"*Que diable allait-il dans cette galere?*"

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Apart from these inherent absurdities and improbabilities, this witness has deposed in examination-in-chief that when he had gone to see the children of Bachu Singh a doctor from Chabramau had come to see the children. Not a word about seeing the doctor from Chabramau has been deposed to by Thakur Kandhai Singh (P. W. 3), who had taken this witness with him to the house of Bachu Singh. His evidence is an apt illustration of the Persian saying that "a liar has got no memory", and from another point of view vindicates the French saying that "one needs to have a good memory to be an efficient liar." This witness has also deposed in cross-examination that when he and Kandhai Singh reached the spot he could not go to the main door of Bachu Singh's house as there was a huge fire blazing there. If that is accepted as correct then it effectually demolishes the beautiful story of the heroism of Hakim Singh hastily stripping himself of his shirt and rushing inside the house to save his brother and his children from a terrible death. It is a significant commentary on this account of the plaintiff as to how her husband met with his death that his *dhoti* as well as the clothes of his brother and children were not in the slightest degree burnt or scorched by the fire, and that though the bodies were blackened by smoke the clothes worn by these persons remained untouched. This one fact to my mind goes to show that all the persons who died were inside the house from the very first when the thatch caught fire. It is in evidence that the fire began first in the house of Prem Singh to the west of Bachu Singh's house and a glance at the map prepared by the Patwari Ram Charan Lal (P. W. 8), or at that attached to the judgment of the trial court—will show that the thatch to the north of Bachu Singh's house was nearest to the thatch of Prem Singh's house which first caught fire, and as there was a strong westerly breeze blowing at the time, this thatch to the north of Bachu Singh's house would in the ordinary course of things be the first to get

the sparks flying from the fire in Prem Singh's house and would be the first thatch in Bachu Singh's house to be set on fire, thus blocking the sole entrance into, and exit from, that house. This would explain why Bachu Singh and Hakim Singh and the entire members of their family could not escape from their house, and would also explain how impossible it was for anybody to get inside their house to rescue them. The story of the plaintiff's witnesses that the thatch on the eastern side of Bachu Singh's house first caught fire is to my mind highly improbable, and if it be accepted as correct, then the plaintiff's witnesses are unable to explain why the inmates of the house did not rush to the north side of the house and thus escape all danger instead of going into the *"sedari"* or three door room to the south and thus getting themselves entrapped by the fire.

P. W. 5, Ranjit Kahar, is a resident of village Saidpur where Tej Singh, the brother of the plaintiff, lives. He has always been doing work for Tej Singh and he entered the service of Bachu Singh with the consent of Tej Singh. He is, therefore, a creature of Tej Singh and entirely under his influence while Tej Singh is the *pairokar* of the plaintiff in this case. Although Ranjit professes to be an eye-witness of the occurrence he admits in examination-in-chief that he does not know where Hakim Singh went after he saw him standing at the threshold of the main door and how he was burnt. He also could not explain why Bachu Singh and his family members did not rush out of the house when the thatch on the eastern side of the house caught fire and why they chose to go into the *"sedari"* instead of clearing out of the house by the sole exit on the north side. His evidence to my mind has been rightly rejected by the learned trial Judge.

P. W. 8, Ram Charan Lal, is the Patwari of village Balwa-Sabalpur in the Farrukhabad district. He has deposed that he is the patwari of village Dalupur and that he was at Sultanpur when the fire broke out in the

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house of Hakim Singh which is two furlongs from village Dalupur. His statement was recorded on the 16th of June, 1930 by the Tahsildar of Chabramau and he had then deposed that Musammat Neksi Kuar, the widow of Hakim Singh, was the heir in possession of the joint family property of Hakim Singh and Bachu Singh and that there was no other heir. Two years later in his deposition before the lower court he has repeated that statement and has deposed that he reported mutation to be effected in favour of Hakim Singh's widow as he thought that Bachu Singh must have died first in the circumstances of the case. He has, however, no personal knowledge of the circumstances under which Hakim Singh is said to have survived Bachu Singh before he too died in the conflagration at his house. He has deposed that Ranjit Kahar told him that Hakim Singh's corpse was found in the "*barotha*" and not in the "*sedari.*" He has also deposed in cross-examination that the thatch in front of the main door fell down two or three minutes after it caught fire with the result that the entrance into Hakim Singh's house was blocked. Further on in his cross-examination he has the impudence to depose that if Hakim Singh and Bachu Singh had both died simultaneously he would then have consulted the Registrar Qanungo on this knotty question of law as to who would be the person who would then be entitled to the property and in whose favour he should make the report concerning mutation of names. Although he is a Government servant I have no doubt whatsoever that the learned Subordinate Judge was right in rejecting the evidence of this witness as that of a partisan. He has merely given evidence consistent with the report he made in Tahsil Chabramau that mutation of names should be made in favour of Musammat Neksi Kuar.

P. W. 9, Sub-Inspector Ikram Ali, merely gives formal evidence and his evidence does not help one to decide

as to whether Hakim Singh survived Bachu Singh or not.

The plaintiff herself has given evidence on commission but as she was not an eye-witness of the occurrence her evidence cannot help the Court in deciding the sole issue for determination in this appeal.

This is all the evidence adduced on behalf of the plaintiff and it is impossible to say upon this evidence with any degree of certainty whether Hakim Singh survived Bachu Singh or not. The evidence leaves this question quite undetermined and I agree with the learned Subordinate Judge in holding that nobody knows which of the two brothers died first or whether they died simultaneously.

Nanavutty J.

The learned counsel for the plaintiff-appellant realising the weakness of the evidence produced on behalf of his client has argued with great eloquence that the plaintiff is the sole representative of her husband's family and that *prima facie* title to the property in dispute rests with the widow, and that if the Court is unable to find which of the two brothers died first then the legal conclusion would be that both the brothers died simultaneously. In support of his contention, he has cited a passage from Amir Ali's Law of Evidence, 8th Edition, pages 787 and 788, which runs as follows:

> "Connected with the subject of continuance of life is the question of the presumption of survivorship in common disaster. Allusion is here made to those cases where several persons generally of the same family have perished by a common calamity, such as shipwreck, earthquake, conflagration, railway accident or battle, and where the priority in point of time of the death of one over the rest exercises an influence on the rights of third parties. The Civil law recognised certain arbitrary rules or presumptions for determining the relative times of death of two or more persons who perished in the

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same catastrophe. These rules were based on the age, sex or state of health of the parties. So a child under the age of puberty was presumed to have died before its parent, but if above that age the rule was reversed. These fixed presumptions, however, never prevailed in the Common Law, and the Courts rejecting this conjectural mode of ascertaining the truth have laid down the rule that the case must be determined upon its own peculiar facts and circumstances whenever the evidence is sufficient to support a finding of survivorship, but in the absence of any such evidence the question of such survivorship is regarded as unascertainable, and in such cases, the question is determined as if the death of all occurred at the same moment."

The learned counsel for the plaintiff-appellant has also cited a ruling of the Bombay High Court reported in *Yeknath Narayan* v. *Laxmibai* (1), where the learned Chief Justice of the Bombay High Court, Sir Norman Macleod, observed as follows:

> "Therefore, when the evidence on the question who died first is so evenly balanced, I think we are entitled to say that the probabilities are in favour of the younger man surviving the elder."

The learned counsel for the appellant also relies on a ruling of the Calcutta High Court reported in *Gopal Chandra Deb Goswami* v. *Padmapani Goswami* (2), in which it was held that "the ordinary presumption in human nature is that the elder man died first." Upon the strength of these two rulings the learned counsel for the plaintiff-appellant has asked this Court to hold that, as Bachu Singh was admittedly older than Hakim Singh, the presumption should be made that Hakim Singh survived Bachu Singh.

Reliance has also been placed by the learned counsel for the appellant upon section 184 of the English Law of Property Act (1925), Ch: 20, 15 George V (L. R.—

(1) (1922) I.L.R., 47 Bom., 37 (41). (2) (1912) 18 I.C., 814.

Statutes—1925, Vol. I, p. 700), by which it has been enacted that:

> "In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder."

Learned Counsel for the appellant has also referred to the presumptions of law laid down in such matters in the Code Napoleon, and has asked this Court to hold in the present case that if the evidence on the record establishes a perfect equipoise as to which brother survived the other, then the presumption in law should be that the younger survived the elder and that therefore Hakim Singh, the husband of the plaintiff, should be held to have survived his brother Bachu Singh.

On the other hand Mr. Sen, the learned counsel for the respondents, has invited the attention of the Court to Halsbury's Laws of England, Vol. XIII, page 503, where the following passage occurs:

> "Where several persons perish in the same disaster, there is, in the absence of evidence on the point, no presumption as to the order in which they died, or that they died at the same time. The *onus probandi* lies on the party who asserts survival, or concurrent decease, or pre-decease.
>
> Where legal rights dependent on the fact, or date, of the death of a person have to be adjudicated, and such fact or date cannot be determined on evidence or presumption, and the question cannot be solved by the incidents of the burden of proof, the Court will make the best order that it can in the circumstances."

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The leading English case on this subject is *Wing* v. *Angrave* (1), where the Lord Chancellor, Lord Campbell, delivered himself as follows:

> "Reference was made to the Code Napoleon; but, according to our jurisprudence, where the question arises, which of two individuals, who perished by the same calamity, survived, there is no inference of law from age or sex, and the question is to be decided upon the circumstances proved in each particular case. In the present case, if the question had been tried by a Judge governed by the Code Napoleon, he must have treated it at first as a question of fact, to be decided by the circumstance in evidence, for the incidents of the shipwreck are detailed by an eye-witness, who saw both the husband and the wife carried off by the fatal wave in which they perished. According to the Code Napoleon, *'la presumption de survie est determinee par les circumstances du fait, et a leur defaut, par la force de l'age ou de sexe.'* Therefore, till the Judge had come to the conclusion that the circumstances proved established a perfect equipoise, he could not have resorted to the presumption of law, which, in the absence of satisfactory evidence, he is bound to respect. But with us such a question is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative."

Again Taylor in his well-known treatise on the Law of Evidence as administered in England and Ireland, Vol. I, p. 194, paragraph 203, lays down the law on this subject as follows:

> "In cases of this nature the law of England recognises no presumption, either of survivorship, or of contemporaneous death; but, in the total absence of all evidence respecting the particular

(1) (1860) E.R., H. of L. Vol., 11, p. 397 (403).

circumstances of the calamity, the matter will be treated as one incapable of being determined."

In *Lal Chand Marwari* v. *Ramrup Gir and another* (1) their Lordships of the Privy Council dealing with section 108 of the Indian Evidence Act of 1872 held that when the Court had to determine the date of death of a person who had not been heard of for a period of more than seven years there was no presumption that he died at the end of the first seven years or at any particular date and they made the following observation:

> " 'There is no doubt', said the Court of Queens Bench in *Doe* v. *Nepean* (2), 'that the lessor of the plaintiff must recover by the strength of his own title and in order to do so must prove that he had a right to enter on the land sought to be recovered within twenty years before ejection brought'. To all of which may be added the comment by Giffard, L. J. on *Doe* v. *Nepean* (2), that the *onus of proving death of any person at any particular period must rest with the person to whose title that fact is essential*: *In re Phene's Trusts* (3)."

This dictum of their Lordships of the Privy Council effectually disposes of the contention urged on behalf of the plaintiff-appellant that the burden of proof in the present case lay upon the defendants to show that they had a better title than the plaintiff, who, as the widow of Hakim Singh, represented the family of Hakim Singh and Bachu Singh.

Again in *Achal Ram* v. *Udai Partab Addiya Dat Singh* (4) their Lordships of the Privy Council observed as follows:

> "Both courts appear to have failed with reference to the principle that a plaintiff seeking to recover possession of an estate against a person who is in possession must recover upon the strength of his own title, and not upon the weakness of his adversary's title. That is a principle of law, and a very

(1) (1925) L.R., 53 I.A., 24. (2) 5 B. and Ad., 86, 94.
(3) (1870) L.R., 5 Ch., 139, 151, 152 (4) (1883) L.R., 11 I.A., 51 (57).

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essential principle to be acted upon . . . In short, the Judicial Commissioner comes to the conclusion that, inasmuch as the defendant is shewn to have no title according to his ruling, therefore he has no right to say that the plaintiff is not entitled to succeed. He entirely reverses the rule on which actions to recover possession are founded; namely, that he who seeks to turn another out of possession must first prove that he has a better title. His judgment is consequently erroneous, and ought to be reversed."

The rule laid down in the English Law of Property Act of 1925 is an artificial rule of Statute Law and is not a rule of evidence, and as there is no similar law enacted in India the general rule of evidence that prevails in England as well as in India must be given effect to.

The plaintiff is not a member of the joint Hindu family to which her husband Hakim Singh and his brother belonged. She is not a representative of her husband's family as contended for by her learned counsel. She has claimed, and can only claim, as the heir of her husband, any property which may have devolved upon him before his death. She has failed to establish that her husband survived his brother Bachu Singh. That being the case it follows logically that her suit must fail.

For the reasons given above I hold that this appeal must fail and I would dismiss it with costs.

SMITH, J.:—I have read the judgment of my learned brother Nanavutty, J. and I do not think that there is anything that I can usefully add. I agree with him that this appeal should be dismissed, with costs.

BY THE COURT—The result is that this appeal fails and is dismissed, with costs.

Appeal dismissed.