required by law. Having regard to all the facts and circumstances of the case we make no order as to costs.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

AZIZUL HASAN AND OTHERS (DEFENDANTS-APPELLANTS) *v.* MOHAMMAD FARUQ, PLAINTIFF AND OTHERS, DEFENDANTS (RESPONDENTS)*

1933 *November*, 13

Family arrangement—Death of a person—Dispute among members of the family as regards inheritance—Application for mutation evidencing bona fide *adjustment of conflicting claims, whether constitutes family arrangement—Registration of deeds of family arrangements, if necessary—Evidence Act (I of 1872), section 108—Mahomedan law—Presumption of Mahomedan law in regard to a missing person inheriting property, whether a rule of evidence—Rule, whether superseded by section 108 of the Evidence Act.*

Where on the death of a person a dispute arises among the members of the family as regards the inheritance an agreement arrived at between them contained in a mutation application evidences a *bona fide* adjustment of the conflicting claims, and constitutes a family settlement and its validity is not to be determined by the strength or validity of the claims of the parties. Such an agreement is a valid family settlement and does not require registration. *Sital Singh* v. *Gajindra Bahadur Singh* (1), relied on.

The presumption of Mahomedan law that as regards property coming to a missing person by inheritance he must be deemed to have died at the time of his disappearance, is a rule of evidence only and as such must be taken to have been superseded by the provisions of section 108 of the Indian Evidence Act. *Mazhar Ali* v. *Budh Singh* (2), and *Mairaj Fatima* v. *Abdul Wahid* (3), relied on.

Mr. *M. H. Kidwai*, for the appellants.

Mr. *M. Hafeez*, holding brief of Mr. Zahur Ahmad for the respondents.

Second Civil Appeal No. 68 of 1932, against the decree of Mr. Shyam Manohar Nath Shargha, First Subordinate Judge of Bahraich, dated the 14th of December, 1931, modifying the decree of the Munsif of Bahraich, dated the 26th of August, 1930.

(1) (1928) I.L.R., 4 Luck., 57. (2) (1885) I.L.R., 7 All., 297 (F.B.).
(3) (1921) I.L.R., 43 All., 673

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SRIVASTAVA, J.—This is a defendants' appeal against the decree dated the 14th of December, 1931, of the First Subordinate Judge of Bahraich modifying the decree dated the 26th of August, 1930, of the Munsif of that place. It arises out of a claim based on inheritance.

The facts of the case have been stated at length in the judgment of the lower appellate court and it is not necessary to recapitulate them in this appeal. It will be sufficient to say that the plaintiff Muhammad Faruq claimed through his mother Saeeda a half share in the property belonging to his maternal grandfather Abul Hasan. Abul Hasan had three sons, Abu Muhammad, Naimul Hasan and Nurul Hasan and two daughters, Musammat Saeeda and Musammat Shafia. Nurul Hasan was missing and had not been heard of since about 1887. Abul Hasan died in 1899. Naimul Hasan had predeceased him. Abu Muhammad died in 1917 leaving four daughters, defendants 3, 4, 5 and 6. Abul Mukarim and Aziz-ul-Hasan defendants 1 and 2 are the sons of Nurul Hasan.

The trial court decreed the plaintiff's claim in full. On appeal, the lower appellate court held that the plaintiff was entitled only to a 5 annas 4 pies share in the estate of Abul Hasan.

The present appeal was filed by Abul Mukarim and Azizul Hasan, defendants 1 and 2. Abul Mukarim died during the pendency of the appeal. His heirs were not brought on the record within the prescribed time and the appeal so far as Abul Mukarim's interest was concerned was declared to have abated.

The first contention urged in appeal relates to an agreement arrived at between the members of the family on the death of Abu Muhammad. It is contained in an application (exhibit C3) for mutation which was presented on Abu Muhammad's death. The lower appellate court has found that the agreement constitutes a family arrangement which was binding on Abul Mukarim and the other parties to it. He further held that it

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was not binding on Azizul Hasan, defendant No. 2 who was not a party to it. It is urged on behalf of the appellants that the agreement in question was not a valid family settlement and that exhibit C3 was inadmissible in evidence for want of registration. I am of opinion that the contention has no force. It is sufficiently clear that on the death of Abu Muhammad there was a dispute amongst the members of the family as regards the inheritance The application exhibit C3 evidences a *bona fide* adjustment of the conflicting claims. As remarked in *Sital Singh* v. *Gajindra Bahadur Singh* (1), it is a wrong principle of law to contest the validity of such agreements by having recourse to the expedient of finding out whether the claims of the parties to that agreement were good. The strength or validity of the claims of the parties cannot be made the basis for determining the validity of the family settlement. The case is fully covered by the decision of this Court above referred to. In my opinion the decision of the lower court based upon the authority of *Sital Singh* v. *Gajindra Bahadur Singh* (1) that the agreement in question was a valid family settlement and did not require registration is correct.

Srivastava, J.

Next it was contended that on the findings arrived at by the lower appellate court, the correct share of the plaintiff is only 4 annas 1 $\frac{7}{9}$ pies and not 5 annas 4 pies as found by the lower court. The judgment of the lower court shows that the shares were worked out in the presence of the Counsel for the parties and were agreed to by all the parties present before the Court. It is not denied that the share allotted to Azizul Hasan, appellant, by the lower court is correct. I am satisfied that the share allotted to the two daughters of Abu Muhammad, defendants 3 and 4 who are appellants in this Court, is also correct. They have got in full the share to which they were entitled. It should also be pointed out that defendants 3 and 4 did not appeal to

(1) (1928) LL.R., 4 Luck., 57.

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the lower appellate court. They have therefore no right to dispute the share allotted to the plaintiff which is less than the share to which he was found entitled by the trial Court. The appellants, in seeking to have the share of the plaintiff reduced, seem to overlook the fact that Abul Mukarim was bound by the family settlement arrived at on the death of Abu Muhammad. The result of the lower court's finding that the family settlement was binding on Abul Mukarim is to reduce his share as compared to that of Azizul Hasan who is not bound by the arrangement.

The plaintiff-respondent has also filed cross-objections. He has in the first place questioned the correctness of the lower court's finding that according to a family custom, daughters are excluded from inheritance by sons. The learned Subordinate Judge has discussed the whole of the oral evidence and the *wajib-ul-araiz* with great care. It is not denied before me that the *wajib-ul-araiz* of villages Nakahi and Bahraich contain a record of the said custom. The plaintiff-respondent has entirely failed to make out any grounds for disturbing the finding of the lower court on the question of custom based on the *wajib-ul-araiz* which was also supported by oral evidence.

The only other point urged on behalf of the plaintiff-respondent was that according to the provisions of Mahomedan law, Nurul Hasan having been unheard of since 1887 could not inherit any share in the estate of his father Abul Hasan when the latter died in 1899. In Ramsey's Law of Inheritance page 156, the law is stated as follows:

> "A lost or missing person, in other words, a person absent and unheard of, or, as elsewhere defined "a person who disappears and of whom it is not known whether he be living or dead or where he resides" is considered to be living as regards his own property but dead as regards the property of another. The consequence is that if the period

after which death is presumed by law shall elapse without his being heard of, his own property will go to his inheritors in the usual manner, but any property which he would, if not lost or missing, have inherited from a person who has died after the time at which he was first missed, will go, not to them but (having been reserved in the meantime), to the inheritors of that person."

In Baillie's Mahomedan law page 13 and Al Sirajyyah Mahomedan law of inheritance page 65 also the law on the subject has been stated to the same effect.

The argument on behalf of the plaintiff is that although the rule of Mahomedan law as regards the period after which death is to be presumed, has been abrogated by the provisions of section 108 of the Indian Evidence Act, yet the rule above stated as regards the rights of the missing person in respect of inheritance derived from other persons is a rule of substantive law relating to inheritance and must be given effect to as such. I regret I am unable to accede to the argument. The rule as enunciated in Ramsey's Mahomedan law of Inheritance and in the other books referred to above, shows that according to the Mahomedan law in the case of missing persons different presumptions arise according as the case is one in which the right is to be ascertained with regard to property which he might have inherited from others or with respect to property which belonged to the missing person himself. In *Mazhar Ali* v. *Budh Singh* (1) Mr. Justice Mahmood discussed the matter at some length and held that these rules of the Mahomedan law were only rules of evidence and not of succession or inheritance. Therefore according to the provisions of clause (1) of section 2 of the Evidence Act the courts are bound to administer the rules contained in that Act. It follows that the rules in question must be deemed to have been abrogated by the provisions of section 108 of the Evidence Act. This case was followed by a Bench

(1) (1885) I.L.R., 7 All., 297 (F.B.).

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of the Allahabad High Court in *Mairaj Fatima* v. *Abul Wahid* (1). In the last mentioned case it was held that the presumption of Mahomedan law that as regards property coming to a missing person by inheritance he must be deemed to have died at the date of his disappearance, is a rule of evidence only and as such must be taken to have been superseded by the provisions of the Indian Evidence Act. If I may say so with respect, I am in full agreement with the views expressed in the case.

The result, therefore, is that the appeal as well as the cross-objections both fail and are dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice J. J. W. Allsop

1933 *October*, 3

HARNAM SINGH, RAJA (DEFENDANT-APPELLANT) *v.* RANI BAHU RANI (PLAINTIFF-RESPONDENT)*

Court Fees Act (VII of 1870), Schedule I, Article 1 and Schedule II, Article 17—Cross-objections—Court-fee payable on cross-objections, whether to be ad valorem.

Held, that the court-fee on cross-objections should be paid *ad valorem* according to the value of the subject-matter in dispute under Article 1, Schedule I of the Court Fees Act and not as laid down for the case of appeals in Article 17 of Schedule II of the Court Fees Act. Article 17 refers in terms to plaints and memorandums of appeal and makes no mention of cross-objections. The word "cross-objections" was added to Article 1, Schedule I when the Court Fees Act was amended in 1908 but no such word was added to Article 17, Schedule II. *Lakhan Singh* v. *Ram Kishan Das* (2), relied on.

Mr. *M. Wasim,* for the appellant.

Mr. *Naim Ullah,* for the respondent.

SRIVASTAVA and ALLSOP, JJ.—This is an office report about the deficiency in court-fee paid on cross-objections. The plaintiff cross-objector contends that court-fee

*First Civil Appeal No. 6 of 1933.

(1) (1921) I.L.R., 43 All., 673. (2) (1918) I.L.R., 40 All., 93.