

FULL BENCH

Before Mr. Justice E. M. Nanavutty, Mr. Justice Rachhpal Singh
and Mr. Justice H. G. Smith

1934
April, 19

RAMKALI AND OTHERS (DEFENDANTS-APPELLANTS) *v.* NARAIN
SINGH (PLAINTIFF-RESPONDENT)*

*Evidence Act (I of 1872), section 108—Person not heard of for
7 years—Presumption of death—Presumption of death at a
particular time, within 7 years, whether can be raised.*

If a person has not been heard of for 7 years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.

Where, therefore the plaintiff brings a suit for possession of some plots and groves on the allegation that he was the nearest reversioner of a certain person who had not been heard of for seven years before the institution of the suit and it is found that the plaintiff cannot succeed in establishing his claim unless he proves by evidence at what particular time that person had died, there is no presumption of law that he had died on the date of the suit. *Lal Chand Marwari v. Ramrup Gir* (1), *Doe v. Nepean* (2), *Neksi Kuar v. Jwala Kuar* (3), *Wing v. Angrave* (4), *Muhammad Sharif v. Bande Ali* (5), *Rekhab Das v. Sheobai* (6), *Jangi Singh v. Gudri Singh* (7), *In re Ganesh Das Aurora* (8), *Gopal Bhimji Apte v. Manaji Ganuji Padval* (9), *B. Veeramma v. G. Chenna Reddi* (10), *Punjab v. Natha* (11), *Faqir Bakhsh Singh v. Dan Bahadur Singh* (12), *Mahadeo Singh v. Har Bukhsh Dube* (13), *Deshrani v. Thakur Kishore Singh* (14), and *Jeshankar v. Bai Divali* (15), referred to and discussed.

*Second Civil Appeal No. 253 of 1932, against the decree of Babu Mahabir Prasad, Subordinate Judge of Lucknow, dated the 18th of July, 1932, reversing the decree of S. Akhtar Ahsan, 2nd Munsif, District Lucknow, dated the 3rd of October, 1931.

- | | |
|-----------------------------------|-----------------------------------|
| (1) (1925) I.L.R., 53 I.A., 24. | (2) 5 B. and Ad., 86, 94. |
| (3) (1934) I.L.R., 9 Luck., 46. | (4) (1860) E.R.H. & L., Vol. XI. |
| (5) (1911) I.L.R., 34 All., 36. | (6) (1923) I.L.R., 45 All., 466. |
| (7) (1932) 30 A.L.J.R., 175. | (8) (1926) I.L.R., 54 Cal., 126. |
| (9) (1922) I.L.R., 47 Bom., 451. | (10) (1912) I.L.R., 37 Mad., 446. |
| (11) (1931) I.L.R., 12 Lah., 718. | (12) (1918) 21 O.C., 143. |
| (13) (1927) 4 O.W.N., 1077. | (14) (1927) A.L.R., Nagpur, 104. |
| (15) (1919) 57 I.C., 525. | |

1934

The case was originally heard by a Bench consisting of Hasan, C.J. and Smith, J., who considering the importance of the proposition of law involved in the case referred it to a Full Bench for decision. The referring order of the Bench is as follows:

RAM KALI
v.
NARAIN
SINGH

HASAN, C.J. and SMITH, J.: In this case the plaintiff claimed the property of one Ram Lal as his heir. It is stated in the plaint that Ram Lal has not been heard of for the last seven years (*vide* paragraph 6). On this fact the lower appellate court has founded the presumption that Ram Lal was dead on the date of the institution of the suit. It is argued on behalf of the defendants before us that there is no presumption in law that Ram Lal died on the date of the institution of this suit. In support of this contention reliance is placed upon the decision of their Lordships of the Judicial Committee in the case of *Lal Chand Marwari v. Ramrup Gir* (1). The lower appellate Court has, in deciding the point in favour of the plaintiff, referred to a decision of a single Judge of this Court in the case of *Mahadeo Singh v. Har Bakhsh Dube* (2). We are of opinion that the proposition of law involved in the defendants' argument in this case is of sufficient importance to be decided by a Full Bench of the Court. Accordingly, under section 14(1) of the Oudh Courts Act, 1925, we refer the following proposition to the Full Bench for decision:

Is there any presumption of law, in the circumstances of this case, that Ram Lal, whose estate is in dispute, died on the date of the suit?

Messrs. *Bhagwati Nath* and *P. L. Varma*, for the appellants.

Messrs. *Lakshman Prasad* and *Raj Kumar Srivastava*, for the respondents.

NANAVUTTY, RACHHPAL SINGH and SMITH, JJ.:—The question referred to the Full Bench for decision runs as follows:

“Is there any presumption of law, in the circumstances of this case, that Ram Lal whose estate is in dispute, died on the date of the suit?”

The facts of the case out of which this reference arises are briefly as follows:

The plaintiff, Narain Singh, brought a suit for possession of certain plots and groves situate in village Dayal-

(1) (1925) L.R., 53 I.A., 24.

(2) (1927) 4 O.W.N., 1077.

1934

RAM KALI
v.
NARAIN
SINGH

*Nanavally,
Rachpal
Singh and
Smith, J.J.*

pur, pargana Nigohan, tahsil Mohanlalgaunj, in the district of Lucknow. He came to Court on the allegations that the property in suit was the joint family property of two brothers, Harpal Singh and Ram Lal, that Harpal Singh died on the 29th of March, 1920, and made a will of half of the property in favour of his widow Musammat Ramkali, defendant No. 1, and also in favour of defendant No. 2, Bishunath Singh, that Ram Lal Singh had not been heard of for over seven years prior to the filing of the suit, and that the plaintiff was his nearest reversioner and claimed the share of Ram Lal deceased, which was half of the property possessed by Harpal Singh and Ram Lal. Defendants Nos. 3, 4 and 5 have been impleaded as they are mortgagees and in possession of certain plots on behalf of Musammat Ramkali, defendant No. 1. The defendants admitted that Ram Lal had not been heard of for more than seven years, but denied that the plaintiff was the nearest reversioner of Ram Lal, and they further alleged that neither Ram Lal nor the plaintiff Narain Singh had been in possession within limitation, and that Harpal Singh, and after him defendants Nos. 1 to 5, had been in adverse possession of the property in suit for over 12 years. It was also stated on behalf of the plaintiff that the property in suit was the joint family property of Harpal Singh and Ram Lal, and that Ram Lal survived Harpal Singh and was in possession of half of the property, while the other half was in the possession of Musammat Ramkali, defendant No. 1. On the other hand it was stated on behalf of the defendants that the property in suit was the self-acquired property of Harpal Singh and Ram Lal, that Ram Lal disappeared during the lifetime of Harpal Singh, who remained in possession of the whole property in suit, and that at his death defendant No. 1, Musammat Ramkali, succeeded to the whole of it as his widow. The issues framed in the case were as follows:

- (1) Is the plaintiff the nearest reversioner of Ram Lal as alleged?

1934

 RAM KALI
 v.
 NARAIN
 SINGH

(2) If so, have the defendants been in adverse possession of Ram Lal's share as alleged?

(3) To what relief and against which of the defendants is the plaintiff entitled?

(4) Was the property in suit the joint family property of Harpal Singh and Ram Lal as alleged?

(5) To what amount, if any, is the plaintiff entitled as *mesne* profits?

Nanavutty,
Rachihal
Singh and
Smith, J.J.

The learned Munsif dismissed the plaintiff's suit with costs.

On appeal the learned Subordinate Judge of Lucknow decreed the plaintiff's suit with costs.

The defendants filed the second appeal, out of which this reference has arisen, and they challenged the finding of the lower appellate court that Ram Lal must be presumed to be dead only on the date of the institution of the suit. It is this presumption of law that Ram Lal died on the date of the suit upon which the learned Subordinate Judge has proceeded, and which has been made the subject of reference to this Full Bench.

In our opinion, after hearing the arguments of the learned Counsel of both parties at great length, the answer to the question referred to us must be given in the negative. There is no presumption of law that Ram Lal, whose estate is in dispute in the present case, must in the circumstances of this case be deemed to have died on the date of the suit.

Sections 107 and 108 of the Indian Evidence Act are the only two sections relevant for our present purpose. Section 107 lays down that when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Section 108 of the Indian Evidence Act runs as follows:

"108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he

1934

RAM KALI

v.

NARAIN
SINGH*Nanavutty,
Rachhpal
Singh and
Smith, JJ.*

had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Dealing with these sections of the Indian Evidence Act, their Lordships of the Privy Council, in *Lal Chand Marwari v. Ramrup Gir and another* (1), at page 21, held that there is no presumption at all as to when a certain person died. "That, like any other fact, is a matter of proof", and proceeding further their Lordships delivered themselves of the following pronouncement:

"Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Indian Evidence Act and the law of England: *Rango v. Mudiyeppa* (2); searching for an explanation of this very persistent heresy their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trusts* (3) run as follows: 'If a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.'

Later on their Lordships quoted the comment of Giffard, L. J. on *Doe v. Nepean* (4) to the effect "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 the present case it is clear that the plaintiff cannot succeed in establishing his claim unless he proves by oral and documentary evidence at what particular time Ram Lal died, when succession opened out to him, and whether at that particular time when succession opened out to him he (the plaintiff) was the nearest reversioner.

(1) (1925) L.R., 53 I.A., 24.

(3) L.R., 5 Ch., 139.

(2) (1898) I.L.R., 23 Bom., 296.

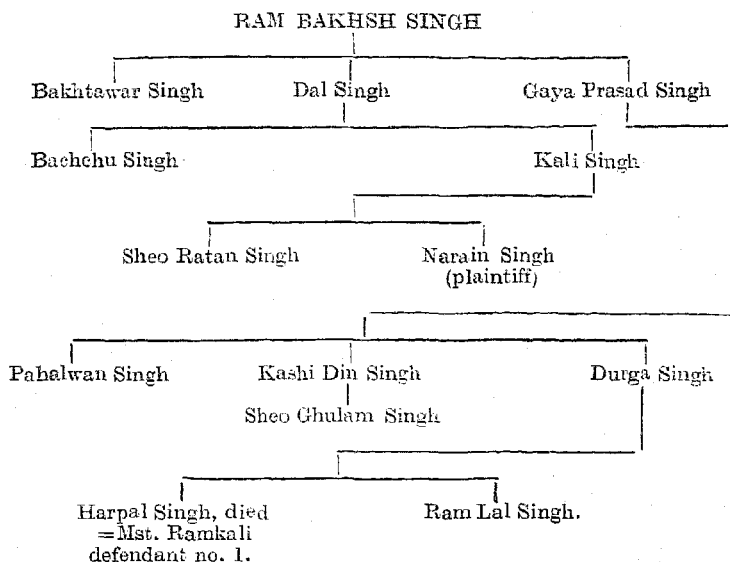
(4) 5 B. & Ad., 86, 94.

The pedigree filed by the plaintiff is admitted by the defendants and is as follows:

1934

RAM KALI
v.
NARAIN
SINGH

*Nanavutty,
Rachpal
Singh and
Smith, J.J.*



Before the plaintiff can succeed in proving himself to be the nearest reversionary heir, he must prove in sequence that Harpal Singh and after him Kashi Din Singh and after him Pahalwan Singh and after him Sheo Ghulam Singh and after him Kali Singh predeceased Ram Lal. The exact date of Ram Lal's death is important from the point of view of the success of the plaintiff's case, because it was only then that succession opened out, and it is only by proving the exact date of Ram Lal's death that the plaintiff can succeed in establishing his claim to be the nearest reversionary heir of Ram Lal.

In a recent case, *Musammat Neksi Kuar v. Musammat Jwala Kuar* (1), decided by a Bench of this Court to which two of us were parties, it was held that where a Hindu widow claimed possession of the property on the ground that her husband survived his brother for a short time, and that the joint family property descended by survivorship to the plaintiff's husband, the suit of the widow must be dismissed, as there was no presumption

(1) (1934) I.L.R., 9 Luck., 461.

1934

RAM KALI
v.
NARAIN
SINGH

that the plaintiff's husband survived his brother, and the burden of proving that her husband survived his brother lay on the plaintiff.

Nanavutti,
Rachpal
Singh and
Smith, J.J.

In *Wing v. Angrave* (1), the Lord Chancellor, Lord Campbell laid down that the question of survivorship in English Law is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative.

In *Muhammad Sharif and another v. Bande Ali and others* (2), it was held by a Full Bench of the Allahabad High Court that the presumption which it is permissible to make under section 108 of the Indian Evidence Act does not go further than the mere fact of death, and that there is no presumption in any case as to the date of the death of the person in question, and that the true proposition is that those who found the right upon a person having survived at a particular time must establish the fact affirmatively by evidence, and that in that particular case it lay upon the plaintiff to show by affirmative evidence that Dildar Ali survived Madad Ali, and that he having failed to do so, the suit could not succeed.

Again in *Rekhab Das v. Musammatt Sheobai and another* (3) it was held that a court cannot presume under section 108 of the Indian Evidence Act that, because the person has not been heard of, he died at any particular moment, or in any particular way, or from any particular cause.

The same proposition was enunciated in *Jangi Singh v. Gudri Singh and another* (4), where it was held that there could be no presumption under section 108 of the Indian Evidence Act that a person who has not been heard of for more than seven years was dead at a particular time, and that where in order to succeed in a suit it was necessary for a person to establish that a particular person who had not been heard of for a number of years, was dead at a particular time, the plaintiff had to prove

(1) (1860) E.R., H. & L., Vol. XI. (2) (1911) I.L.R., 34 All., 36.
P. 397.
(3) (1923) I.L.R., 45 All., 466. (4) (1932) 30 A.L.J.R., 175.

the factum of his death at the said time by affirmative evidence either direct or circumstantial, and that the fact could not be held as proved upon a mere presumption.

1934
 RAM KALI
 S.
 NARAIN
 SINGH

In re Ganesh Das Aurora (1), it was held that although under section 108 of the Indian Evidence Act, a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the exact time of his death, and that, therefore, if any one had to establish the precise time at which a certain person died, he must do it by actual evidence.

*Nanavutti,
 Rakhpal
 Singh and
 Smith, JJ.*

In Gopal Bhimji Apte v. Manaji Ganuji Padval (2), it was held that under section 108 of the Indian Evidence Act, the presumption relates to the fact of death, and has no reference to the date of the death of a person, and that the date of the person's death has to be proved like any other fact by the party who is interested in establishing that he died on or before a particular date.

Similarly in *B. Veeramma v. G. Chenna Reddi and two others* (3), it was held that sections 107 and 108 of the Indian Evidence Act do not lay down any presumption as to how long a man was alive, or at what time he died.

In *Punjab and others v. Natha and others* (4), it was held by a Full Bench of the Lahore High Court that section 108 of the Indian Evidence Act raised a presumption that at the institution of the suit a certain person G. was dead, but no presumption as to the date of his death could or did arise under the section, and the date of his death had to be proved by the plaintiffs in the same way as any other relevant fact in the case.

In *Musammat Deshrani and another v. Thakur Kishore Singh and others* (5), it was held that when the question was not merely one of death, but of death at a particular time, there was no presumption under section 108 of the Indian Evidence Act as to the exact time when

(1) (1926) I.L.R., 54 Cal., 185.

(2) (1922) I.L.R., 47 Bom., 451.

(3) (1912) I.L.R., 37 Mad., 440.

(4) (1931) I.L.R., 12 Lah., 718.

(5) (1927) A.I.R., Nagpur, 101.

1934

RAM KALI
v.
NARAIN
SINGH

a particular person died, and that the party concerned to make out his death on a specific date must prove it by evidence, like any other fact in the case.

Nanavutti,
Rachhpal
Singh and
Smith, J.J.

The learned Counsel for the respondent relies upon the rulings reported in *Faqir Bakhsh Singh and others v. Dan Bahadur Singh and others* (1), *Mahadeo Singh v. Har Bukhsh Dube* (2), and *Jeshankar v. Bai Divali* (3). We have examined these rulings but they do not lay down any proposition of law contrary to the rulings cited by the learned Counsel for the appellant.

For the reasons given above our answer to the question referred to us is in the negative and we hold that there is no presumption of law in the circumstances of this case that Ramlal whose estate is in dispute died on the date of the suit.

REVISIONAL CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

SAUN PANDE AND OTHERS (ACCUSED-APPLICANTS) v. KING-EMPEROR (COMPLAINANT-OPPOSITE PARTY)*

1934

April, 20

Criminal Procedure Code (Act V of 1898), section 106—Accused made constructively liable under section 149 of the Indian Penal Code—Action under section 106, whether proper—Meaning of the words “offence punishable under section 149”, in section 106.

Where a person is made constructively liable for an offence by calling in the aid of the provisions of section 149 it is not proper to take action against him under section 106 of the Code of Criminal Procedure.

The words “an offence punishable under . . . section 149” used in section 106 of the Code of Criminal Procedure do not appear to have been accurately used but the meaning clearly seems to be that the section has no application to cases where a person has been convicted of a substantive offence read with

*Criminal Revision No. 34 of 1934, against the order of G. C. Badhwar I.C.S., Sessions Judge of Fyzabad, dated the 8th of February, 1934.

(1) (1918) 21 O.C., 143.

(2) (1927) 4 O.W.N., 1077.

(3) (1919) 57 I.C., 525.