

FULL BENCH.

Before Broadway, Dalip Singh and Johnstone JJ.

PUNJAB AND OTHERS (PLAINTIFFS) Appellants

versus

NATHA AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 2202 of 1927.

Indian Evidence Act, I of 1872, sections 107, 108—Suit for possession — by reversioners — dismissal of—on failing to prove either the death of last holder or that he had not been heard of for seven years—whether such finding amounts to a finding that he was then alive—Limitation—starting point of.

G. having mortgaged his ancestral lands, his reversioners sued for a declaration that the alienation should not affect their reversionary rights on his death. G. went away in 1916. In 1918 and again in 1924 the reversioners sued for possession of the mortgaged property, but failed (the last of the two suits being finally dismissed on 9th March 1926) on the finding that they had not proved G's death or that he had not been heard of for seven years. On 6th August 1926, the reversioners instituted the present suit asking for possession of the land on the ground that seven years had then elapsed since G. had been heard of. Plaintiffs contended that the suit was within limitation, firstly, because the cause of action only accrued when it could be presumed that G. was dead, which presumption only arose at the expiry of seven years from the time that G. was last heard of; and secondly, even if the cause of action accrued on the death of G. it should be presumed that G. was alive in 1924, the appellants' suit filed in that year having been dismissed on the ground that they had failed to prove he was dead, the finding in that case having amounted to a finding based on the provisions of section 107 of the Evidence Act, that G. was then alive; and, having regard to the provisions of section 108, that the *onus* of proving that G. was not dead or had died more than three years before the date of this suit, lay on the defendants.

Held, that the suit had been rightly dismissed; the plaintiffs having failed to prove that they had brought their suit within three years of G's demise.

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For, the decision in the case of 1924, that the death of G. had not been proved, did not amount to a finding that he was then alive; and, G. not having been heard of for seven years when this suit was instituted, section 108 of the Evidence Act came into operation and raised a presumption that at the institution of the suit he was dead, but no presumption as to the date of his death could, or did arise, 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.

Lalchand Marwari v. Mahant Ramrup Gir (1), and *Nepean v. Knight* (2), followed.

Tani v. Rikhi Ram (3), overruled.

Second appeal from the decree of Malik Ahmad Yar Khan, Additional District Judge, Jullundur, dated the 10th May 1927, modifying that of Mirza Zahur-ud-Din, Additional Subordinate Judge, 3rd Class, Jullundur, dated the 7th December 1926, and dismissing also the portion of the suit which was decreed.

BADRI DAS, for Appellants.

ACHHRU RAM and VISHNU DUTA, for Respondents.

The referring Order dated 15th May 1931.

BROADWAY J.—One Godhu, a resident of *Mauza Kultham* in the Jullundur District mortgaged his ancestral lands to Nathu, etc. BROADWAY J.

Punjab and others, reversioners of Godhu, brought a suit for a declaration that the mortgage in question would not affect their reversionary rights. Their suit was decreed on 11th November 1911, it being held that they could get the land on payment of Rs. 81.

(1) (1828) I. L. R. 5 Pat. 312 (P.C.). (2) (1837) 46 R. R. 789.

(3) (1920) I. L. R. 1 Lah. 554.

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In 1916 or thereabouts Godhu went to Basra and in 1918 the reversioners sued for possession on the ground that he was dead. That suit was dismissed on the ground that Godhu's death had not been proved.

Again, in 1924, the reversioners sued for possession urging that as Godhu had not been heard of for some 10 or 11 years he must be presumed to be dead. This suit was also dismissed, the learned District Judge holding that the plaintiffs had not established their right to sue as they had not proved that Godhu had not been heard of for seven years. The District Judge delivered his judgment on the 9th March, 1926, and on the 6th August, 1926 the reversioners instituted the present suit asking for possession of the land on the ground that seven years had then elapsed since Godhu had been heard of.

The trial Court decreed their suit in part but on appeal it was dismissed as barred by time. The learned Additional District Judge held that, as nothing had been heard of Godhu for seven years and more, his death could be presumed, but that nevertheless it was incumbent on the plaintiffs to prove that they had brought their suit within three years of his demise, which they had failed to do.

The plaintiffs have now come up in second appeal and it has been urged that the view taken by the lower Appellate Court was wrong and that the death of Godhu having been presumed the suit should have been decreed.

Sections 107 and 108 of the Indian Evidence Act have been referred to. These sections are as follows:—

Section 107—“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—"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 had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

It has been contended that once the death of Godhu had been presumed under section 108 the *onus* of proving that he was alive rested on the defendants-respondents.

For the appellants Mr. Badri Das relied on *Narki v. Lal Sahu* (1), *Tani v. Rikhi Ram* (2), *Jeshankar Revashankar v. Bai Divali* (3) and *Muhammad Chiragh v. Abdul Haq* (4).

On the other hand Mr. Achhru Ram for the respondents relies on *Lal Chand Marwari v. Mahant Ramrup Gir* (5), *Nepean v. Knight* (6), *J. J. Deshpande v. R. N. Joshi* (7) and *Fateh Ali v. Ahmad Din* (8), as supporting the view taken by the Lower Appellate Court.

The question is not free from difficulty. It seems to me clear that section 108 of the Indian Evidence Act merely creates a presumption that the person in question is dead at the date of the suit and does not refer in any way as to the date of his death.

The authorities cited are conflicting and I think that the question involved is of such importance as necessitates an authoritative pronouncement by a Full

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(1) (1910) I. L. R. 37 Cal. 103. (5) (1926) I. L. R. 5 Pat. 312 (P.C.).

(2) (1920) I. L. R. 1 Lah. 554. (6) (1837) 46 R. R. 789.

(3) (1920) 57 I. C. 525.

(7) (1916) I. L. R. 40 Bom. 239.

(4) (1921) 64 I. C. 468.

(8) (1927) 100 I. C. 833.

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Bench of this Court and I would, therefore, refer the case to such a Bench.

JOHNSTONE J.—I agree.

JUDGMENT OF THE FULL BENCH.

BROADWAY J.

BROADWAY J.—This appeal came before my brother Johnstone and myself on the 17th May last and as certain important points are involved, we deemed it advisable to refer the matter to a Full Bench.

The facts are to be found in the order of reference and need not be recapitulated.

Mr. Badri Das for the appellants has contended that the suit was within limitation, firstly, because the cause of action only accrued when it could be presumed that Godhu was dead which presumption only arose at the expiry of seven years from the time that Godhu was last heard of, and, secondly, even if the cause of action accrued on the death of Godhu inasmuch as it should be presumed that Godhu was alive in 1924, the appellants' suit filed in that year having been dismissed on the ground that they had failed to prove he was dead. He contended that the finding in that case amounted to a finding, based on the provisions of section 107, Indian Evidence Act, that Godhu was then alive. He further contended that, having regard to the provisions of section 108 of the Evidence Act, the *onus* of proving that Godhu was not dead or had died more than three years before the date of this suit lay on the defendants-respondents.

In support of his contention he relied on *Fhani Bhushan Bannerji v. Surjya Kanta Roy Chowdhary* (1), followed in *Narki v. Lal Sahu* (2) and *Tani v. Rikki Ram* (3).

(1) (1908) I. L. R. 35 Cal. 25. (2) (1910) I. L. R. 37 Cal. 103.

(3) (1920) I. L. R. 1 Lah. 554.

On the other hand Mr. Achhru Ram for the respondents contended that the cause of action accrued on the death of Godhu and that it was incumbent on the plaintiffs to prove that his death took place within three years of the institution of their suit. In addition to the authorities cited by him before the Division Bench, he relied on *Dharup Nath v. Gobind Saran* (1), *Venkata Hanumanulu Garu v. Lachchamma* (2), *Veeramma v. Chenna Reddi* (3), *Rango Balaji v. Mudiyeppa* (4) and *Moola Cassim v. Moola Abdul Rahim* (5).

I have examined all the authorities cited and have come to the conclusion that the matter is concluded by the decisions of their Lordships of the Judicial Committee in *Lalchand Marwari v. Mahant Ram Rup Gir* (6), where it was held that section 108 of the Evidence Act only raises a presumption that on the date of the suit the person concerned was dead and does not raise any presumption as to the date of his death—that, like any other fact, being a matter of proof. They point out that on this question there is no difference between the law of India as declared in the Indian Evidence Act and the law of England, and approved of the decision in *Nepean v. Knight* (7).

In my judgment, there can be no doubt that, in the present case, the cause of action accrued to the plaintiffs-appellants on the death of Godhu and that therefore it was incumbent on them to show that his death occurred within three years of their suit. It is true that *Tani v. Rikhi Ram* (8), supports Mr. Badri

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(1) (1886) I. L. R. 8 All. 614. (5) (1906) I. L. R. 33 Cal. 173 (P.C.).

(2) (1904) 14 Mad. L. J. 464. (6) (1926) I. L. R. 5 Pat. 312 (P.C.).

(3) (1914) I. L. R. 37 Mad. 440. (7) (1837) 46 R. R. 789.

(4) (1899) I. L. R. 23 Bom. 296. (8) (1920) I. L. R. 1 Lah. 554.

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Das's contention that the *onus* was on the defendants-respondents to prove the contrary, but that view is opposed to the pronouncements of their Lordships of the Judicial Committee already referred to as well as the other authorities cited, and with all respect to their Lordships who decided that case I find myself unable to agree with their views.

The decision in the case of 1924 was that the death of Godhu had not been proved—there was no finding that he was then alive—two very different things. Godhu not having been heard of for seven years when this suit was instituted, section 108 of the Evidence Act came into operation and raised a presumption that at the institution of the suit he was dead, but no presumption as to the date of his death could, or did arise and the date of his death had to be proved by the plaintiffs-appellants in the same way as any other relevant fact in the case.

In these circumstances I consider that the suit has been rightly dismissed and would dismiss this appeal. I would, however, leave the parties to bear their own costs in this Court.

ALIP SINGH J.

DALIP SINGH J.—I agree.

JOHNSTONE J.

JOHNSTONE J.—I agree.

N. F. E.

Appeal dismissed.