

this case became his as it formed, under the terms of his *kowl*. Under Regulation XVII of 1827, sec. 7, the Collector could dispose of uncultivated land, but no private right could thus be impaired. A suit in the ordinary Court was contemplated and expressly provided for. It could be brought without setting aside the Collector's order; and if the Collector's order was wholly unjustifiable, it was not apparently intended that a person dispossessed by it need or should take any step, except a suit for dispossession.

The plaintiff's *kowl* is not before us, nor have we the other documents necessary for forming a final judgment on this case, even on the point of limitation. Whether the suit is barred or not, will depend, in some measure, on the particular facts and the times when they occurred. We do not desire to prejudge these, or the conclusions to which they will lead; but they must be considered, and that they may be so, we reverse the decree of the District Court, and remand the cause for retrial with reference to the foregoing observations. Costs to follow the final decision.

Decree reversed and case remanded.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nánabhái Haridás.*

DHONDO BHIKA'JI, (ORIGINAL DEFENDANT), APPELLANT, v. GANESH
BHIKA'JI, (ORIGINAL PLAINTIFF), RESPONDENT.*

1886.
November 19.

Hindu law—Inheritance—Missing person—Presumption of death—Claim after seven years—Co-owners—Absent co-owner—Claim to his share of property a question of evidence, not of succession—Evidence Act I of 1872, Sec. 102.

D., G., and B. were co-owners of certain *khoti* villages. B. disappeared and was unheard of for more than seven years. In his absence, D. received his (B.'s) share of the rents and profits. G. claimed to be entitled to a moiety of B.'s share therein, and brought this suit against D.

*Second Appeal, No. 9 of 1886.

1886.
SHIVAJI
YESJI
CHAWAN
v.
THE
COLLECTOR OF
RATNÁGIRI.

1886.

DHONDO
BHIKÁJI
v.
GANESH
BHIKÁJI.

Held, that G. was entitled to such moiety. B., having been absent and unheard of for more than seven years, might be presumed to be dead, under section 108 of the Evidence Act I of 1872; and G., as one of his two survivors, was entitled to a moiety of his property.

Where the right of a party claiming to succeed to the property of another is based on the allegation that the latter has not been heard of for more than seven years, the question to be decided is one of evidence, and not a part of the substantive law of inheritance.

Parmeshar Rái v. Bisheshar Singh⁽¹⁾ concurred in.

THIS was a second appeal from a decision of G. Jacob, Acting Assistant Judge of Ratnágiri.

Dhondo, Ganesh, (the plaintiff), and Bháskar were co-sharers in certain *khoti* villages situated in the Ratnágiri District, and, as such, entitled to their respective shares in the profits thereof. For ten years, however, prior to the institution of this suit, Bháskar had not been heard of, and during that time the defendant Dhondo, (as the plaintiff alleged), had received Bháskar's share of the profits, and had appropriated them to his own use. The plaintiff claimed to be entitled to a moiety thereof, and filed this suit.

The Subordinate Judge of Chiplún, in the Ratnágiri District, rejected the plaintiff's claim. The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decree, and allowed the claim, with the following remarks:—

“It is true that the plaintiff has no actual right to a portion of Bháskar's share until the latter's death; but neither has the defendant any such right, nor is there any reason why he should be preferred to the plaintiff. It is said that Bháskar may eventually return, but in that case his claim to his share of the profits might be barred by limitation, and then the defendant would have reaped the whole benefit of his absence. As a matter of equity, I think, the plaintiff's claim is admissible. There is no dispute about the amount of the claim.”

The defendant appealed to the High Court.

Gangáram Bápsobá Relé for the appellant:—The Hindu law provides that the lapse of twelve years shall entitle any co-owner to a share in the profits of the estate of a missing co-owner. The

(1) I. L. R., 1 All., 58.

Evidence Act does not supersede this rule of law. Any co-owner may lay claim to an absentee's share after twelve years—see Strange's Hindu Law, Vol I, p. 117. Section 26 of Regulation II of 1827 lays down the law to be applied in such cases—*Ganesh Parashram v. Ragho Vishnu*⁽¹⁾.

1886.

DHONDO
BHIKAJI
v.
GANESH
BHIKAJI

There was no appearance for the other party.

SARGENT, C. J.:—We do not think the decree of the Court below can be supported on the ground stated by the Assistant Judge. The plaintiff can only establish a claim to a moiety of Bhaskar's share in the rent as heir of Bhaskar, and it was as such that it was dealt with by the Subordinate Judge at the trial. Bhaskar had been admittedly absent for more than seven years, and by section 108 of the Evidence Act his death might legally be presumed. We agree with Mr. Justice Spankic in *Parmeshar Rai v. Bisheswar Singh*⁽²⁾ that the question whether a person is to be presumed to be dead, is one of evidence, and not a part of the substantive law of inheritance.

We, therefore, confirm the decree of the lower Appellate Court.

Decree confirmed.

(1) Printed Judgments for 1879, p. 18.

(2) I. L. R., 1 All., 53.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

GORAKH BABAJI AND OTHERS, (ORIGINAL PLAINTIFFS), APPLICANTS, v.
VITHAL NARAYAN JOSHI, (ORIGINAL DEFENDANT), OPPONENT.*

1887.
January 17.

*Civil Procedure Code (Act XIV of 1882), Sec. 622—Revision—Illegality—
Judge's duty to decide secundum allegata et probata.*

The plaintiffs sued upon two bonds executed by the defendant in their father's favour, one for Rs. 200 and the other for Rs. 99-15 annas.

The defendant in his written statement, as well as in his deposition, admitted execution of the bonds in question, but pleaded non-receipt of consideration.

The Subordinate Judge held that the bond for Rs. 200 was not proved, but awarded the claim upon the other bond.

* Application under Extraordinary Jurisdiction, No. 28 of 1886.