

APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Chatterjee.

NARKI

v.

LAL SAHU.*

1909
Sept. 2.

Death, presumption of—Evidence Act (I of 1872) s. 108—Person not heard of for seven years—Time as to when presumption arises—Onus of proof.

When a person is not heard of for seven years, the presumption that arises under s. 108 of the Evidence Act is that he is dead at the time when the question is raised and not at some antecedent date.

Fani Bhushan Banerji v. Surjya Kanta Roy Choudhry (1) followed.

Moolla Cassim v. Moolla Abdul Rahim (2) referred to.

SECOND APPEAL by the plaintiff, Musammat Narki.

The plaintiff, the daughter of one Shaik Moula Buksh Miyan, deceased, brought a suit for the recovery of the possession of certain holdings by virtue of a deed of gift from her father, dated the 12th August 1880, but was resisted by the defendant, Musammat Phekya, on the ground that the properties in dispute were jointly held by Moula Buksh and his brother, Halkhori, who died in 1862, and that since the death of Halkhori she as the wife of Halkhori's son, Mangru, had been in possession of a half share of the disputed lands.

Mangru had gone abroad about the year 1862, ten years prior to the death of his father, Halkhori, and had not been heard of since. Moula Buksh died after his brother, Halkhori, having executed a deed of gift in favour of the plaintiff of all his properties, including the property of which he was jointly in possession with his brother, Halkhori.

The Munsif decreed the suit on the ground that Musammat Phekya was not the heiress, because her husband, Mangru, the son of Halkhori, as appeared from the defendant's own

* Appeal from Appellate Decree, No. 722 of 1907, against the decree of Rajendra Nath Dutt, Subordinate Judge of Chapra, dated Jan. 31, 1907, modifying the decree of Ali Ahmed, Munsif of Chapra, dated July 2, 1909.

(1) (1907) I. L. R. 35 Calc. 25.

(2) (1905) I. L. R. 33 Calc. 173.

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evidence, left ten years before the death of his father, and had not been heard of ever since, and that the legal presumption was that he died during the lifetime of his father, and did not inherit.

On appeal by Musammat Phekya, the Subordinate Judge of Chapra held that from the fact that Mangru disappeared ten years before the death of his father, the only presumption under section 108 of the Evidence Act was, that he was dead at the time of the present suit, and there was no presumption as to the time when he died, and the onus was on the plaintiff to prove that her father, Moula Buksh, inherited the full moiety of his brother, Halkhori; and that the latter's son, Mangru, having predeceased his own father, and there being no evidence as to the time of Mangru's death beyond the fact of his disappearance as stated above, the plaintiff was not entitled to succeed except to the eight annas share she received from her father and two annas share which she received from Mangru under the Mahomedan Law of inheritance. On these findings, the Subordinate Judge modified the decree of the Munsif decreeing ten annas share to the plaintiff and six annas share to Musammat Phekya, the defendant No. 3. Thereupon, the plaintiff preferred this second appeal to the High Court.

Babu Dwarka Nath Mitter, for the appellant, relied on *In re Phene's Trusts* (1) and *Moolla Cassim v. Moolla Abdul Rahim* (2), as supporting the view that when Mangru had not been heard of for ten years before his father's death, the presumption was that he predeceased his father.

Maulavi Mahomed Mustafa Khan, for the respondent, relied upon section 108 of the Evidence Act and the note thereon at page 573 of Amir Ali and Woodroffe's Evidence Act (4th Edition), and *Fani Bhushan Banerji v. Surjya Kanta Roy Chowdhry* (3), as showing that there was no presumption as to the time of Mangru's death, the only presumption being that he was dead at the time of suit.

Babu Dwarka Nath Mitter, in reply.

Cur. adv. vult.

(1) (1870) L. R. 5 Ch. App. 139. (2) (1905) L. L. R. 33 Calc. 173, 176.
(3) (1907) I. L. R. 35 Calc. 25.

STEPHEN AND CHATTERJEE JJ. This case comes before us on second appeal and the facts admitted and found are as follows. The plaintiff is the daughter of one Moula Miyan who during his life was in possession of a holding jointly with his brother, Halkhori. The latter died first and Moula Miyan afterwards executed a deed of gift of all the property in question to the plaintiff. The plaintiff sues to recover possession of the holding, but her claim is resisted by defendant No. 3, on the plea that she is the widow of Halkhori's son, Mangru, and is entitled to the property in dispute jointly with the plaintiff and has been so since the death of Halkhori and Moula, and is now in possession. It is admitted that if Mangru died after Halkhori this contention is correct. All that we know about Mangru is that he went abroad about 1862, ten years before the death of Halkhori, which occurred in 1872, and has not since been heard of by those who would naturally have heard of him if he had been alive. Under these circumstances, the plaintiff in order to make out her case must establish that Mangru died before Halkhori. She has not done this by evidence, and the question is whether she can derive any assistance from section 108 of the Evidence Act. If that section applied to the case the burden of proof would shift, and instead of the plaintiff having to prove that Mangru was dead at a given time, the defendant would have to prove that he was then alive. But we are constrained to hold that it does not. In *Fani Bhushan Banerji v. Surjya Kanta Roy Chowdhry*, (1), it is expressly laid down by Geidt J. that the presumption that arises on a man not having been heard of for seven years is a presumption that he is dead at the time when the question is raised, that is, in this case at the date of the suit, and not at some antecedent date, that is, at the time of Halkhori's death in 1872. The judgment of Maclean C.J. seems, on the facts mentioned in the judgment of Geidt J., to be to the same effect. A similar view was expressed by the Burmah Chief Court in *Moolla Cassim v. Moolla Abdul Rahim* (2) and was accepted by the Privy Council. This is not

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the English Law as may be seen in the judgment in the leading case of *In re Phene's Trusts* (1) and the cases there quoted, and were the matter *res integra* we are not sure that we should attribute to the words of section 108 the effect that is given to them in the cases we have mentioned. As it is, however, we have to hold that though a plaintiff alleging Mangru's death in 1869 would not have had to prove it then, the present plaintiff must prove that he was dead three years later. This state of the law may give rise to some highly anomalous situation as would be the case had Mangru's estate been administered in 1872. But in the present case the plaintiff, to make good her claim, must prove that her father was entitled to 16 annas of what he purported to give her, and to do this, must establish that Mangru died before his father which she has failed to do. Her father was, however, at the time of his gift entitled to eight annas of the property, and she is, therefore, entitled to this. In addition to this the Subordinate Judge has allowed her an additional two annas, or ten annas in all, but as there is no cross appeal we need not consider whether this decision is correct.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

S. A. A. A.

(1) (1870) L. R. 5 Ch. App. 139.