

Narki Vs. Lal Sahu

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Court : Kolkata

Decided On : Sep-02-1909

Reported in : (1910)ILR37Cal103

Judge : Stephen and ;Chatterjee, JJ.

Appellant : Narki

Respondent : Lal Sahu

Disposition : Appeal dismissed

Judgement :

Stephen and Chatterjee, JJ.

1. 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* (1807) I.L.R. 35 Calc. 25, 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* (1905) I.L.R. 33 Calc. 173 and was accepted by the Privy Council. This is not the English Law as may be seen in the judgment in the leading case of *In re Phene's Trusts* (1870) L.R. 5 Ch. App. 139 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.

2. The result is that this appeal is dismissed with costs.

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