

**Smt. Mathru and ors. Vs. Smt. Rami**

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**SooperKanoon Citation :** [sooperkanoon.com/888460](http://sooperkanoon.com/888460)

**Court :** Himachal Pradesh

**Decided On :** Mar-26-1985

**Reported in :** AIR1986HP6

**Judge :** V.P. Gupta, J.

**Acts :** [Hindu Succession Act, 1956](#) - Section 8; ;[Evidence Act, 1872](#) - Section 108

**Appeal No. :** R.S.A. No. 41 of 1973

**Appellant :** Smt. Mathru and ors.

**Respondent :** Smt. Rami

**Advocate for Def. :** R.K. Sharma, Adv.

**Advocate for Pet/Ap. :** P. Malhotra, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

ORDER

**V.P. Gupta, J.**

1. Aggrieved from the judgment and decree dated 25-8-1973 passed by the District Judge, Mandi the appellants (hereinafter the plaintiffs) have filed the present appeal.

2. The facts of the case are that the plaintiffs-appellants filed a suit for declaration and injunction against the respondent (hereinafter the defendant) to the effect that the plaintiffs are the owners in possession of the share of Lohka in land measuring 24-3-1 bighas (fully detailed in the plaint) situate in Khaleen, Tehsil Sundernagar, District Mandi. The plaintiffs are the daughters and widow of Labhdoo (brother of Lohka) and the defendant is the sister of Lohka. Labhdoo and Lohka purchased the disputed land in equal shares from Harbhaj (husband of defendant) in 1949. After about 4/5 years of this purchase Lohka left his house and his whereabouts were unknown since then. It is alleged that he is presumed to have died about 14/15 years back and Labhdoo remained in possession of this land. After the death of Labhdoo, plaintiffs being the rightful heirs of Labhdoo came in possession of the disputed land and remained in its possession continuously. During the recent settlement, it was noticed that the defendant was recorded as an heir of Lohka vide mutation No. 1 sanctioned on 17-10-1969. The plaintiffs alleged that the defendant was not an heir of Lohka (deceased) and the mutation was wrongly sanctioned in her favour. The plaintiffs also claimed that in case they were not found to be the rightful heirs of Lohka then in that case they had become owners of the disputed property (share of Lohka) by adverse possession.

3. The suit was contested by the defendant and the defendant denied the plaintiffs' claim. Upon the pleadings of the parties the following issues were framed on 1-6-1971 : --

1. Whether the plaintiffs inherited Lohka deceased 14/15 years ago as alleged OPP (objected to by the counsel for the defendant).

2. In case issue No. 1 is not proved, whether the plaintiffs have been in adverse possession of the suit land for over twelve years and have become its owners? OPP

3. Whether the plaintiffs have no enforceable cause of action? OPD

4. Relief.

4. The learned Senior Sub Judge, Mandi vide his judgment and decree dated 30-11-1972 decided issues Nos. 1 and 2 against the plaintiffs and issue No. 3 against the defendant. As a result of these findings he dismissed the plaintiffs' suit.

5. The plaintiffs filed an appeal in the Court of District Judge, Mandi and challenged the findings of the Senior Sub Judge on issue No. 1 only. The District Judge by his judgment dated 25-10-1973 affirmed the findings of the learned Senior Sub Judge on issue No. 1 with the result that the plaintiffs' appeal was dismissed with costs.

6. I have heard the learned counsel for the parties.

7. Mrs. Malhotra, the learned counsel for the appellant, contends that Lohka died about 14/15 years before the institution of the suit. She relies upon the statement of the defendant who admitted that Lohka had not been heard of for the last about 12/13 years. She contends that Lohka should be presumed to have died prior to the coming into force of the Hindu Succession Act and for this reason the defendant could not inherit his estate.

8. The learned counsel for the defendant supports the judgment of the two Courts below and contends that the whereabouts of Lohka were not known, but the plaintiffs have not proved that Lohka died prior to the coming into force of the Hindu Succession Act.

9. I have considered the contentions of the learned counsel for the parties and have also gone through the records of the case.

10. Saina Ram (PW 1) and Dhian Singh (PW2) state that Lohka died about 17/18 years ago and Labhdoo died about 11/12 years ago. They further state that after the death of Lohka, Labhdoo came in possession of the land pertaining to the share of Lohka and after the death of Labhdoo the plaintiffs came in possession of the land by inheritance.

11. Rami (defendant) (DW 1) states that Lohka was not heard of for the last 12/13 years.

12. The statements of Saina Ram (PW 1) and Dhian Singh (PW 2) were recorded in December 1971 while the statement of Rami was recorded on 10-10-1972. In the plaint the plaintiffs allege that the whereabouts of Lohka were not known for more than 14/15 years. The suit was filed on 10-1-1970 and according to the allegations of the plaintiffs the whereabouts of Lohka were not known from the year 1964-65. The contention of the learned counsel for the plaintiffs that Lohka should be presumed to have died in 1954-55 cannot be accepted in view of the provisions of Sections 107 and 108 of the Evidence Act. The only presumption under Section 108 of the Evidence Act is that a person is presumed to have died if he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive and the burden of proving that the person is alive is shifted to the person who asserts it. Under Section 107 of the Evidence Act, if it is shown that a person was alive within 30 years, then the burden of proving that he is dead is on the person who asserts it. There is no presumption that a person who has not been heard of for a period of not less than 7 years died at the end of first 7 years or on any particular date. The burden of proving the date of death of a person is always upon the person who asserts that a person had died on a certain date because there is no presumption about the date of death. The only presumption under Section 108 of the Evidence Act is that a person is dead, if he has not been heard of for seven years and this presumption only arises when a question is raised in a Court etc. as to whether a person is alive or dead. Such presumption can earliest be drawn when a dispute is brought in a Court or proceedings.

13. In the present case the plaintiffs have not proved the date, month or year of death of Lohka. The earliest document which can be taken into consideration for the purposes of ascertaining the date of death of Lohka is Ex.PC (Mutation No. 1 sanctioned on 10-10-1969). This mutation was entered for expungement of name of Lohka on 11-11-1968 on a report that the whereabouts of Lohka were not known for the last about 20/22 years. The revenue officer after observing the various formalities regarding proclamation etc. sanctioned this mutation on 10-10-1969 in favour of the defendant. The mutation came before the revenue officer for the first time in 1969 and therefore, the only presumption under Sections 107 and 108 of the Evidence Act can be that Lohka was not alive in 1969. No other

evidence regarding the date of death of Lohka prior to 1969 is available. In revenue records Lohka was entered in possession of the disputed land till 1969.

14. In view of the aforesaid evidence, the earliest date which can be fixed for the death of Lohka will be year 1969. In such circumstances, the defendant will be a preferential heir to the estate of Lohka. because the defendant being the sister of Lohka falls in Class II of the schedule of heirs under the Hindu Succession Act. The plaintiffs will have no right to succeed as against the defendant. It may be mentioned that Labhdoo died somewhere between 1958 to 1961 because in the Jamabandi of the year 1957-58 (Ex.DB) Labhdoo is entered as an owner of the property, but in the Jamabandi of 1961-62, the plaintiffs are shown to be the owners of that property, as heirs of Labhdoo. Saina Ram (PW 1) and Dhian Singh (PW 2) also state that Labhdoo must have died in the year 1959-60. Labhdoo never agitated that the name of Lohka be expunged from the revenue records on the ground that Lohka was dead or his whereabouts were not known for more than seven years. For this reason also it cannot be presumed that Lohka died prior to 1958, that is, during the lifetime of Labhdoo or before the enforcement of Hindu Succession Act.

15. In view of the above discussion, both the Courts below have rightly decided issue No. 1 against the plaintiffs.

16. No other point was urged before me.

17. As a result of the above discussion, there is no merit in this appeal which is hereby dismissed.