

(1909) 09 CAL CK 0005
In the Calcutta High Court

Musammat Narki

APPELLANT

Vs

Musammat Phekia and Others

RESPONDENT

Date of Decision : 02-09-1909

Acts Referred:

Citation : (1909) 09 CAL CK 0005

Judgement

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 Halkori. 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 the sole respondent before us, on the plea that she is the widow of Halkori's son Mangru, and is entitled to the property in dispute jointly with the plaintiff and has been so since the death of Halkori and Moula, and is now in possession. It is admitted that if Mangru died after Halkori this contention is correct. All that we know about Mangru is that he went abroad about 1862, ten years before the death of Halkori, 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 Halkori. 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 Bhusan Banerjee v. Surja Kant Roy Chowdhury 11 C.W.N. 853 : 5 C.L.J. 649 : 35 C. 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 Halkori'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 10 C.W.N. 33 : 33 C. 173 : 2 C.L.J. 236 : 15 M.L.J. 317 : 7 Bom. L.R. 892 : 2 A.L.J. 798 : 32 I.A. 177 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 Phenes Trust* 5 Ch. App. 139 : 39 L.J.Ch. 316 : 22 L.T. 111 : 18 W.R. 303 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 situations 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 to her entitled to 8 annas of the property, and she is, therefore, entitled to this. In addition to this the Sub-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.