

(1923) 03 AHC CK 0043
In the Allahabad High Court

Musammat Sheobai and Another

APPELLANT

Vs

Rekhab Das

RESPONDENT

Date of Decision : 20-03-1923

Acts Referred:

Citation : (1923) ILR (All) 466

Hon'ble Judges : Walsh, J;Piggott, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Walsh, J.—We have come to the conclusion that this appeal must be allowed and the suit dismissed. The point is a short one, but an interesting one and not so technical and artificial as it appeared at first sight. We are much indebted to Mr. Piari Lal Banerji for his able argument on behalf of the appellant. The point may be stated in a very small compass. There is an undoubted mystery about the fate of one Kedar Nath, who was engaged in commercial pursuits. He was a Bania who lived in Calcutta and who, for adequate reasons, namely, that he was accused of embezzlement, disappeared. This happened in December, 1907, that is to say, just a little more than 13 years before this suit. He was only 23. He had no children. He had a young wife, and although feeble efforts have been made to prove his subsequent existence, nothing (infinite is known about it. If one had merely, on questions of fact, to draw inferences permitted by Section 114 of the Evidence Act, many considerations would have to be taken into account, including what has been pressed upon us on behalf of the respondent, that in the case of one who was not shown to have left the country, it is almost certain by now that he is dead. On the other hand, one cannot leave out of account the fact that for many years he had paramount reasons for remaining concealed, that a childless wife is not much esteemed in this country, and that the war which followed 7 years afterwards has altered, one may say, the comparative values of inferences as to the whereabouts of persons whose addresses are unknown. Many Indians have joined, or followed, the troops, and have remained abroad.

The Post is far from perfect, as yet. The widow, alleging permission from her husband, a fact which has been rejected by the court below, went through the form of adopting a son in 1916 and the present defendant appellant, being then plaintiff, brought a suit seeking a declaration that the adoption was void. The respondent to this appeal, setting up the adoption naturally relied on the presumption, or shifting of the onus, denoted by Section 108 of the Evidence Act. Now, if there is one thing more certain than another, it is that it is clearly established in India, as in England, and particularly expressed in a Full Bench decision in *Muhammad Sharif v. Bande Ali* ILR (1911) All. 36 that what the court may presume u/s 108 is confined to the factum of death. It cannot presume that, because the person has not been heard of, he died at any particular moment, or in any particular way, or from any particular cause; and that being so, the defence in the former suit was bound to fail, because, the presumption being the sole thing which was relied upon, the court was prohibited by law from finding that Kedar Nath had died before 1915, the date of adoption. It might express an opinion as strongly as it pleased that he was "dead at the date of the suit, but, in my judgment, that would be a mere dictum, and even although it framed an issue, and went to the length of holding that he was dead at the date of suit, it would not be an issue as defined by Section 11 of the Code Civil Procedure, "substantially or directly in issue between the parties to that suit. It would be irrelevant, because he might be presumed dead at the date of suit, and yet not dead at the date of the adoption which was the only material question to be decided. Encouraged by the observations of the learned Subordinate Judge, who dealt with the former suit, the widow made a second attempt to adopt, namely on the 18th of June, 1919, and having in her favour, or her advisers; thinking that they had in their favour an expression of opinion that the man was dead in 1918 and that, therefore, he must be still dead in 1919, this suit was brought for partition, based upon the adoption which itself was based upon the alleged decease before June, 1919. The learned Judge in disposing of this second suit, in a very clear judgment, without disposing of the question of fact, has held himself compelled to adopt the theory on which the suit was based, namely, that the issue of death was *res judicata*, that death in the year 1918 had been established in the previous suit, and that, therefore, he was compelled by law to hold that it was proved to have occurred before June, 1919. In this respect we find ourselves unable to agree with him as a matter of law. There is no doubt as to his view. He says: "When once *inter partes* he was presumed to be dead, when the question next arises, he will be presumed to have died when it was decided *inter partes* that he is presumed to be "dead." The fallacy in that statement is that there was no decision in favour of the presumption of his death, *inter partes*. There was merely an expression of opinion. The question whether he could be presumed to be dead *inter partes* in that suit was not one which was "substantially or directly in issue within the meaning of Section 11 of the Code". We, therefore, think that the decision on the question of *res judicata* was wrong. We feel less hesitation in dismissing the suit, which after all we are bound to do if that is our view, inasmuch as, at any rate in my opinion, this suit is premature, and really an

abuse of the process of the court. The respondent's counsel pressed us on the question of fact, namely, that the death was proved. But when one listened to him one realized that he was unable to pursue the argument on the question of fact, without continually grasping the weapon, if I may so describe the presumption, which he professed as frequently to have thrown away. That is to say, while at one breath he disclaimed any desire to use the presumption, it found a frequent place in his argument, and necessarily so, because the actual evidence of this man's death is nil, and the surrounding circumstances can only be treated as giving rise to the legitimate inference of fact, greater or less according to the particular opinion of the individual who is asked to draw the inference. I feel it desirable to express my view about two aspects of this part of the respondent's argument. In the first place, I have no faith in a case which I am satisfied has been run, if I may use the expression, by some legal gentleman propounding a theory. One question is whether this woman either herself thinks, or is entitled to ask a court to think, that her husband was dead in 1919, and her absence from the box and her failure to produce any evidence before the court tending to show that she has latterly regarded herself, and been regarded by her friends and relations, as a widow, is certainly not encouraging to anyone who is asked to draw an inference which might be destroyed in one blow by the re-appearance of this comparatively young man if she is not prepared to state her reasons for her own belief, it is rather a strong thing to ask the tribunal to do what she appears to shrink from. Secondly, and I am very much impressed by this view of the case, if we were to hold otherwise it seems to me that it would always be possible, in the unusual circumstances which have arisen in this case, for a plaintiff, desirous of benefiting by a presumption of death, to bring a suit, which he or she knows is bound to fail, asking the court to find death at a particular date of the suit, which is admittedly immaterial, and having got a dictum in favour of an immaterial issue in a suit which ought never to have been brought at all, to bring another suit, and to try and force the court to the length of following the presumption which it has already made by an irrelevant dictum in an improper suit. That would amount to an abuse of the process of the court. Three further observations arise which seem relevant. Even, if we followed the suggestion of the respondent's counsel, and starting to examine the evidence de novo endeavoured to arrive at a decision on the issue of fact, we could then do no more than act on the presumption that Kedar Nath was dead at the date of this suit. The Full Bench decision prohibits us from finding that he was dead before that date. It seems to me, therefore, that a decision would not benefit the plaintiff. I do not think, furthermore, that in the first suit the Judge, who is the same Judge who decided this suit and who is particularly clear in the expression of his reasons, ever intended to say what it is alleged that he did say, namely, that he was satisfied that the man was dead at the date of suit. The sentence relied upon is merely his way, in my opinion, of interpreting Section 108 in the English tongue. It should be observed, furthermore, that in the appeal from the judgment

asserts that lie is still alive, if he has not been heard of by people who presumably would have heard of his being still alive after 7 years, and if satisfied in the circumstances of the case that he is dead, having regard to the definition of "proof" in Section 3 of the Evidence Act, the court may presume and find as a fact that he is dead. But it does not follow that merely because a person has not been heard of for 7 years, where there is no positive or reliable evidence that he is in fact alive, the court must find that he was dead at the date of suit, much less that he was dead at any given particular date. This, I think, is the fallacy underlying the judgment of the court below. I doubt, if even now the wife brought a suit for a declaration that her husband was now dead, whether the court, on the evidence on the record as it stands, (particularly in the absence of any evidence given by the wife) would be justified in holding that the husband was in fact dead. In a case where a man has no ostensible or probable reason to disappear, it might be otherwise. Take a case where a man goes on a voyage in a ship which is never heard of again, or where, as happened in a case within my knowledge in this Court, a man started in a country-boat on ordinary business to cross the Ganges, then swollen and turbulent in flood miles wide, in the rains, and-neither he nor the boat was ever heard of again. After seven years of absence, on proper evidence, a court might well act on Section 108 and hold the man was dead when the suit was brought. On the other hand, there was another case in this Court where, in my own experience as Government Advocate, a man wanted for murder was unheard of for over 15 years, and thereafter by accident was discovered and arrested in Rangoon, where he had been living all along and prospering. Each case must be decided on its facts, having regard to the probabilities of human life and conduct.

2. What are the facts here? The husband, aged 23, was in business in a bania's firm in Calcutta. He embezzled his master's money, and to avoid prosecution deliberately absconded, presumably with the money in his pocket. So far as the evidence goes, he has not been heard of since, but is it reasonably probable, from the point of view of the "prudent man", to believe that he is in fact dead? He had every reason to remain "perdu"; there is no limitation against criminal prosecution in India. True, he left behind a young wife. We have no evidence as to whether his relations with his wife were happy or otherwise. People of his caste are married young, without previous acquaintance usually. We do know that she was childless, and as she must have been married to him for some years, having regard to the habits of the country, and had no child, he may well have despaired of getting a son. For all we know, he may now be prospering with a new family in. Kenya or East Africa, or Burma, or any of the other places outside India where it is common knowledge that Indian banias and pedlars have settled. There is the additional fact that the wife was apparently not left, in indigent circumstances, so that there was no stringent obligation on the husband to provide for her support. The learned Judge below has not come to a decision on the merits. As pointed out by my learned brother, he has held that by reason

of his previous judgment (which, however, did not decide that the husband was dead then) he was barred by the rule of "res judicata" from holding otherwise now. I feel some doubt whether we should not have remanded the case back, but, on the whole, I agree with the order proposed.