

APPELLATE CIVIL.

1915.

September
30.*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.*

JAYAWANT JIVANRAO DESHPANDE (ORIGINAL PLAINTIFF), APPELLANT v. RAMCHANDRA NARAYAN JOHSI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), Schedule I, Arts. 140, 141—Suit by a reversioner—Mortgage—Redemption—Widow, disappearance of—Presumption of death—Onus of proof—Indian Evidence Act (I of 1872), section 108.

One S died leaving him surviving his widowed daughter-in-law R. In 1860 R passed a mortgage bond in favour of the 1st defendant's father. In 1865 R disappeared and was not heard of since 1870. In 1911 the plaintiff, as the reversioner of S, sued to recover possession of the property alienated by R. The defendants pleaded limitation. The first Court decided in plaintiff's favour on the ground that under section 108 of the Indian Evidence Act the Court must presume that R died at the time of the suit and therefore the claim was in time. The lower appellate Court reversed the decree and dismissed the suit holding that the presumption of R's death at the time of the suit could not be drawn and that the *onus probandi* which lay heavily on the plaintiff to show when R died was not discharged. The plaintiff having appealed:—

Held, that it lay on the plaintiff to show affirmatively that he had brought his suit within twelve years from the actual death of R.

Nepean v Doe d. Knight⁽¹⁾, followed.

Article 141 of the Limitation Act is merely an extension of Article 140, with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu widow. But the plaintiff's case under each article rests upon the same principle. The doctrine of non-adverse possession does not obtain in regard to such suits and the plaintiff suing in ejectment must prove, whether it be that he sues as remainderman in the English sense or as a reversioner in the Hindu sense, that he sues within twelve years of the estate falling into possession, and that onus is in no way removed by any presumption which can be drawn according to the terms of section 108 of the Evidence Act, 1872.

SECOND appeal against the decision of G. K. Kanekar, First Class Subordinate Judge, A. P., at Sholapur, reversing the decree passed by V. P. Raverkar, Subordinate Judge at Barsi.

* Second Appeal No. 309 of 1914.

⁽¹⁾ (1837) 2 M. & W. 894.

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Suit for redemption or for possession of property.

The facts of the case were as follows :—

The property in suit originally belonged to one Shamrao. Shamrao had a son Kakaji who predeceased him but left a widow Rangubai. Rangubai survived Shamrao and she during her life enjoyed the property.

On the 21st January 1860, Rangubai passed a mortgage bond in favour of Narayan, father of the 1st defendant.

On the 18th February 1860 a money bond was passed by Rangubai to one Bodhraj who in 1861 filed a suit against her on the bond and obtained a decree on the 9th December 1862. The property was sold in execution of that decree and Bodhraj became purchaser at the execution sale in February 1868.

In the year 1865 Rangubai disappeared. She was not heard of since 1870, when she received cash allowance.

In 1868 Narayan filed a suit against Bodhraj on the mortgage bond, and obtained a decree on the 20th September 1870 establishing his right as mortgagee and ordering the defendant Bodhraj to pay Rs. 882 to Narayan in satisfaction of the mortgage debt within six months and in default the right of Bodhraj to redeem to be extinguished. Bodhraj having failed to pay, the property remained in the possession of Narayan.

In the year 1911, the plaintiff sued as reversioner of Shamrao for redemption of the mortgage or if it be held that the mortgage was not subsisting for ejectment of the defendants.

The defendants who were the sons and alienees of Narayan contended *inter alia* that the right to redeem had become extinct; that Rangubai had not been heard of for many years and that the plaintiff's claim was barred by limitation.

The first Court decided the case in favour of the plaintiff on the ground that under section 108 of the Indian Evidence Act, the Court must presume that Rangubai died at the time of the suit and therefore the plaintiff's claim was in time.

The lower appellate Court reversed the decree and dismissed the plaintiff's suit as barred by limitation on the following grounds :—

“ Plaintiff sues as reversionary heir. He must show when Rangubai died. There is no evidence on the record to show the date on which or the month or year in which she died. The lower Court has held that Rangubai died at the time of this suit ; that Court has drawn the presumption of Rangubai's death at the time of the suit under section 108 of Indian Evidence Act of 1872. It has cited the authorities of the cases of I. L. R. 35 Cal. 25, and I. L. R. 37 Cal. page 103, in support of its observation in the matter. I have carefully gone into those authorities, and I am unable to find therein anything which would justify a Court of justice in presuming that a person unheard of died at the time of the suit in which the question of his death is raised. It has been expressly held in I.L.R. 35 Cal. 25, that section 108 of the Evidence Act raises no presumption as to the time of a person's death. Under that section, death is to be presumed after a certain interval, and the burden of proving that the person presumed to be dead at the time of the suit is alive at that time, is shifted to the person who affirms it. That section provides for the burden of proof when the question is whether a man is alive or dead. The only presumption enacted by that section is that the party unheard of is dead at the time of the suit, but that section does not warrant any presumption as to the time of his death. That section is clear on the point. The authorities of I. L. R. 23 Bom. 296, Bombay Law Reporter, Volume VIII, page 226, and I. L. R. 8 All, 614 confirm the same view of the matter. The question of a person's death and question of a particular time of his death are two different questions. The latter question is not contemplated by section 108 aforesaid. The lower Court has erred in presuming that Rangubai died at the time of this suit. Exhibit 15 tends to show that Rangubai died before 18th November 1910. Thus the presumption of her death at the time of the suit cannot be drawn. The *onus probandi* is heavily on plaintiff to show when the said Rangubai died. He has failed to discharge the onus. It was incumbent on plaintiff to show that he was the nearest surviving reversionary heir of the deceased Shamrao at the time of the said Rangubai's death. This plaintiff has not done. The lower Court has found in plaintiff's favour as to these matters on the presumption that Rangubai died at the time of the suit. This presumption is not warranted by law.

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The plaintiff appealed to the High Court.

H.C. Coyajee with N. V. Gokhale for the appellant:—
We accept the mortgage and sue to redeem it. For such a suit we are within time.

[SCOTT, C. J. :—In that case you are bound by the foreclosure decree against Bodhraj.]

Apart from the mortgage we submit that Art. 141 of the Indian Limitation Act unlike Art. 144, has nothing to do with adverse possession, but a suit can be brought within twelve years of the date when the female dies : see *Cursandas Govindji v. Vundravandas Purshotam*⁽¹⁾ confirmed by the case of *Runchordas Vandrawandas v. Parvatibhai*⁽²⁾; *Mukta v. Dada*⁽³⁾; *Hathising v. Satalal*⁽⁴⁾; *McIntosh v. Jharu Molla*⁽⁵⁾ and *Pedder v. Hunt*⁽⁶⁾. The widow must be presumed, under section 108 of the Indian Evidence Act, to have died only on the date of suit, and the burden is therefore on the defendant to prove that she was not alive during the twelve years preceding the suit : see *Fani Bhushan Banerji v. Surjya Kanta Roy Chowdhry*⁽⁷⁾; *Narki v. Lal Sahu*⁽⁸⁾; *Veeramma v. Chenna Reddi*⁽⁹⁾ and *Muhammad Sharif v. Bande Ali*⁽¹⁰⁾.

Campbell with *K. N. Koyajee*, for the respondent.—
If the Indian cases cited lay down a rule of law that under section 108 of the Indian Evidence Act, a person not heard of for seven years must be presumed to have died on the date of the suit, it is not good law. It may be presumed that such a person was dead at the date of the suit, not that he died on that date, and indeed the presumption of death arises at the end of the first seven years of the period during which such a person was

(1) (1889) 14 Bom. 482.

(2) (1899) L.R. 26 I. A. 71.

(3) (1893) 18 Bom. 216.

(4) (1899) 2 Bom. L. R. 106.

(5) (1894) 22 Cal. 454 at p. 455.

(6) (1887) 18 Q. B. D. 565.

(7) (1907) 35 Cal. 25

(8) (1909) 37 Cal. 103.

(9) (1912) 37 Mad. 440.

(10) (1911) 34 All. 36.

not heard of, but the precise period *during those seven years* at which he died must be proved by actual evidence. Taylor on Evidence, 10th Edn. p. 200; *Nepean v. Doe d. Knight*⁽¹⁾. The case of *Nepean v. Doe d. Knight*⁽¹⁾ is also authority for the proposition that an ejectment by a remainderman or reversioner must be brought within the statutory period of limitation after the original right of entry of the plaintiff has accrued whatever be the nature of the defendant's possession, adverse or non-adverse, and that it is for the plaintiff to prove affirmatively the date of this right of entry within the prescribed period.

SCOTT, C. J.:—This suit was brought by the plaintiff, claiming to be the reversioner of one Shamrao the original owner of the property, for redemption of a mortgage or for possession of the property. Shamrao, the original owner, had one son Kakaji who predeceased him, but left a widow Rangubai. Rangubai survived Shamrao, and she during her life enjoyed the property. She passed a mortgage-bond in favour of Narayan, father of the 1st defendant, on the 21st January 1860. In 1865 she disappeared, and she has not been heard of probably since 1865 or certainly since 1870 when she is alleged to have received a cash allowance. In 1861 a suit was filed against her by Bodhraj on a money-bond passed by Rangubai to him on the 18th February 1860, and Bodhraj obtained a decree on the 9th December 1862. The property was sold in execution of that decree, and Bodhraj became the purchaser at the execution sale in February 1868. In the same year Narayan, the father of defendant 1, filed a suit against Bodhraj on the mortgage bond, and eventually a decree was passed in the appellate Court in favour of Narayan establishing his right as mortgagee, and ordering the defendant Bodhraj to pay Rs. 882 to Narayan in satisfaction of the

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mortgage-debt within six months, and declaring that if the payment was not made within the time specified, Narayan would become the absolute owner and Bodhraj would be foreclosed. That decree was passed on the 20th September 1870, yet notwithstanding the decree, the plaintiff sues as the reversionary heir of Shamrao for redemption of the mortgage, or if it be held that the mortgage is not subsisting for ejectment of the defendants.

The first Court decided the case in favour of the plaintiff on the ground that under section 108 of the Indian Evidence Act the Court must presume that Rangubai died at the time of suit, notwithstanding that she had not been heard of, at all events since 1870, and that, therefore, the plaintiff's claim was in time, and he was entitled to recover on the death of Rangubai as the reversioner.

From that decision an appeal was preferred to the lower appellate Court which reversed the decree, and we have now to decide whether the decision of the lower appellate Court is correct. Dealing first with the position under the mortgage bond, under certain circumstances the mortgage might have been binding upon the reversioners, but it is found as a fact that the mortgage was not passed by Rangubai for any legal necessity or for justifying cause. It, therefore, bound only the interest of Rangubai in the property. The mortgage by reason of the foreclosure decree on default by Bodhraj in 1870 came to an end, and the mortgagee became entitled as against Rangubai to the position of an absolute owner of her estate in the mortgaged property. There is, therefore, no mortgage in existence which can be redeemed, and the only question is whether the plaintiff can succeed in his suit as a reversioner upon the death of Rangubai having regard to the provisions of Article 141 of the Limitation Act.

Now his suit assumes the death of Rangubai, otherwise he could not claim to be a reversioner. But the learned Judge of the trial Court has held that Rangubai's death occurred at the time when the suit was filed. That assumes that the plaintiff is entitled to rely upon the absence of news of Rangubai as proof of a fact, the onus of proving which lies upon him, namely, that he sues within twelve years of the estate opening for the benefit of reversioners. Article 141 of the Limitation Act is merely an extension of Article 140, with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu widow. But the plaintiff's case under each Article rests upon the same principle. The doctrine of non-adverse possession does not obtain in regard to such suits and the plaintiff suing in ejectment must prove, whether it be that he sues as a remainderman in the English sense or as a reversioner in the Hindu sense, that he sues within twelve years of the estate falling into possession, and that onus is in no way removed by any presumption which can be drawn according to the terms of section 108 of the Evidence Act.

The exact point for the purpose of Article 140, and also, in our opinion of Article 141, has been decided many years ago in England soon after the passing of the English law of Limitation regarding Real Property in *Nepean v. Doe d. Knight*⁽¹⁾. The facts there were that one Matthew Knight, a previous owner of the property, was last heard of in May 1807, and the declaration in the action for ejectment which was brought by the reversioner or remainderman was dated the 18th January 1834. The doctrine obtaining in England with regard to presumption of death was that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not

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that he died at the beginning or the end of any particular period during those seven years. Now if seven years be added to May 1807 when Matthew Knight was last heard of, it would bring us to May 1814 within twenty years of the date of the declaration in the action. Twenty years was the period within which under the Real Property Limitation Act the plaintiff must bring his suit in ejectment. It was, however, held that there was no presumption that Matthew Knight had died on the last day of those seven years or on any particular day within those seven years, and that the plaintiff must establish by affirmative proof that he brought his suit within twenty years of his lessor's estate falling into possession. Lord Denman delivering the judgment of the Court said (p. 912) :—

“The doctrine...laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of.”

And later he continues :—

“It is true, the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death, by proving the absence of Matthew Knight, and his not having been heard of for seven years, whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the onus is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died.”

It was, therefore, held that the plaintiff had not succeeded in discharging the onus which was upon him, although the declaration was within twenty years of

the expiry of the seven years from the last news of the death of Matthew Knight.

That case appears to us to be directly in point.

The decision of the Appeal Court *In re Phene's Trusts*⁽¹⁾ only throws doubt upon the statement of Lord Denman that the law presumes that a person shown to be alive at a given time remains alive until the contrary is shown on the ground that if the man could only be presumed to be dead after seven years from the date of the last news of him a presumption of life would carry his existence up to the end of the seven years as was held (as Giffard L. J. thought wrongly) by Vice Chancellor Malins in *In re Benham's Trust*⁽²⁾. There is more to be said for the view of Malins Vice Chancellor where the law is as stated in sections 107 and 108 of the Evidence Act.

The criticism of Giffard L. J. does not however affect the direct application of the judgment in *Nepean v. Doe d. Knight*⁽³⁾ to the case now before us and we must hold that it lies on the plaintiff to show affirmatively that he has brought his suit within twelve years from the actual death of Rangubai. In so holding we do not run counter to any Indian decision upon section 108 of the Evidence Act.

The plaintiff has not discharged the onus which lies upon him and, therefore, his claim was rightly rejected by the lower appellate Court. We affirm the decree and dismiss the appeal with costs.

Decree confirmed.

J. G. R.

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

(2) (1867) L. R. 4 Eq. 416.

(3) (1837) 2 M. & W. 894.

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