

(1880) 01 AHC CK 0017

Allahabad High Court

Case No: None

Hasan Ali and Others

APPELLANT

Vs

Mahrban

RESPONDENT

Date of Decision: Jan. 12, 1880

Citation: (1880) ILR (All) 625

Hon'ble Judges: Robert Stuart, C.J; Spankie, J; Pearson, J

Bench: Full Bench

Final Decision: Disposed Of

Judgement

Robert Stuart, C.J.

I generally concur in the view taken in this case by the Subordinate Judge, who, however, appears to have very unnecessarily occupied himself with the consideration of the Evidence Act, and with the remarks of the select committee of the Legislative Council thereon. The suit is brought by the plaintiffs for the establishment of their rights to property on the allegation that the inheritance to them has opened by the disappearance and death, during his father's lifetime, of one Farzand Ali. With respect to this Farzand Ali the facts appear to be these:--He left his home and his family in 1857, the year of the mutiny, at which time he would appear to have been about 30 years old, and therefore, if alive when this suit was instituted, his age would then have been about 51 years. He has not since been heard of, but there is nothing on the record to prove his death. Under these circumstances the first question is what is the law to be applied to the case? The parties are Muhammadans, and the question raised in the suit being one regarding succession and inheritance, the 24th section of the Bengal Civil Courts Act VI of 1871 immediately applies, and the Muhammadan law must, in the words of Section 24, form "the rule of decision," and the Evidence Act has no application whatever. The only question therefore is, what, on the facts stated, is the Muhammadan law on the subject? This question may be answered without doubt or difficulty, and it is simply this, that for ninety years from the date of his birth the property of a missing person

is kept in abeyance, the principle of Muhammadan law appearing to be that, in the absence of proof to the contrary, the missing person is presumed to be alive. This rule of the Muhammadan law appears to be the result of all that is to be found in the leading authorities on that law,--Macnaghten, Baillie, and others. Now, applying this rule of Muhammadan law so stated, it is clear that the property of Farzand Ali cannot be claimed by the plaintiff's, but must be in abeyance until the expiry of ninety years from his birth, that is, for about forty years yet to come, unless in the meantime evidence is obtained proving his death. The Subordinate Judge appears to have correctly applied this rule of Muhammadan law to the facts of the case, and I would therefore affirm his order and dismiss the present appeal with costs.

2. I should add that the Full Bench case of Parmeshar Rai v. Bisheshar Singh ILR 1 All. 53 is quite consistent with the view I have taken of the facts in the present case. There the suit was brought for the avoidance of a deed of mortgage executed to the detriment of the plaintiff's reversionary rights, and it was therefore held that the provisions of Section 108 of the Evidence Act should be applicable. I was absent from the Court when this judgment was given and I express no opinion as to whether I consider it right or wrong. But the opening sentences of the judgments of Turner, J., who was acting for me, and of PEARSON, J., clearly support the view I have taken in the present case. This portion of the judgment of the Full Bench is as follows:--"The plaintiffs in this suit are not claiming the estate of Janki Rai, the missing person, by right of inheritance; were they claiming it, inasmuch as Janki Rai has been missing for only eight or nine years, their claim might be inadmissible under Hindu law. But they are claiming nothing belonging to him." And the judgments of Spankie, J., and Oldfield, J., are to the same effect.

Spankie, J.

3. This being a suit for inheritance under the Muhammadan law, that law will apply to it, in regard to the missing person, Farzand Ali. The Full Bench ruling in Parmeshar Rai v. Bisheshar Singh ILR 1 All. 53 of this Court is not in conflict with this opinion. The lower Appellate Court therefore was not wrong in holding that the case must be governed by Muhammadan law. These remarks dispose of the first plea.

4. On the second plea it appears to me that the judgment of the lower Appellate Court is wrong and that the Munsif was right.

5. According to the Muhammadan law of inheritance, a missing person is considered as living in regard to his own estate, so that no one can inherit from him, and dead in regard to the estate of another, so that he does not inherit from any one, and his estate is reserved until his death can be ascertained, or the term for a presumption of it has passed over. I find a summary of the law quoted from well-known authorities and cited in the Madras edition of Macnaghten's Muhammadan law, referred to by Babu Shama Charan Sirkar in his printed Tagore Lectures.--"Thus, if he (the missing person) had an estate when he disappeared, or if at that time he

was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age, but must remain in trust until that time, when it will devolve upon those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person, to whom he is an heir he is so far considered to be alive, that his share is set aside, but such share is not reserved in trust for him and his heirs, but delivered to the other heirs, who would have taken it if he had been dead; if he returns after this, he will be entitled to his share, but if he does not return it devolves on the heirs who came into possession at the former distribution, but not to the heirs of the missing person." Again: "If a missing person be a co-heir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus, in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case, the daughters will take half the estate immediately, as that must be their share at all events, but the grand-children will not take anything, as they are precluded on the supposition of their father being alive. "

6. Farzand Ali became lost during the lifetime of his parents, and his daughter, the defendant, according to the view of the law expressed above, could not, under the circumstances, inherit.

7. For these reasons I would decree the appeal and reverse the judgment of the lower Appellate Court and restore that of the Munsif with costs.

8. Stuart, C.J., and Spankie, J., differing on a point of law, the appeal was referred, u/s 575 of Act X of 1877, to PEARSON, J. by whom the following Judgment was delivered:

Pearson, J.

9. The property in suit did not belong to Farzand Ali, the missing man, but would have been more or less inherited by him, had he survived his parents. The plaintiffs are his sisters and a cousin, who married one of them: the defendant is his daughter, and, if she be not entitled to the property, they are. Her contention is that her father is still alive, and, if the contention be true, it is apparent from the rules of Muhammadan law cited by my learned colleague Spankie, J., that she is not entitled to hold the property either as heir or trustee, although Farzand Ali may be entitled to it should he return. The plaintiffs do not assert that he is dead, but nothing has been heard of him since he disappeared in 1857, and the strong probability is that he died in the lifetime of his parents, in which case his daughter could not inherit, through him, any portion of their estate. This being so, in concurrence with Spankie, J., I decree the appeal with costs, reversing the lower Appellate Court's decree and restoring that of the Court of the First Instance.