Ahmed Shah Vs Mudassir Shah

Court: Bombay High Court

Date of Decision: March 30, 1944

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 16 Rule 14

Citation: (1945) 47 BOMLR 591

Hon'ble Judges: Thankerton, J; Madhavan Nair, J; Luxmoore, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

Madhavan Nair, J.
This is an appeal from the decree of the Court of Judicial Commissioner, North West Frontier, dated June 13,

1941,which affirmed the decree of the Senior Subordinate Judge, Peshawar, dated December 23, 1938, by which a suit brought by the appellants

against the respondents was dismissed.

2. The appellants are the parents of Lady Shamas Shah, who was the wife of a retired officer of the political service of the Government of India.

The respondents are his nephews.

3. Lady Shamas Shah and her husband lost their lives in the earthquake at Quetta,, which occurred early in the morning of May 31, 1935. Sir

Shamas Shah was 68 at the time of his death, and his wife 26, They had no children. At the time of the earthquake, Sir Shamas Shah, his wife, her

younger sister, and one Mst. Faruq, a maid servant, were staying in his bungalow which collapsed in the earthquake. They were buried under the

debris.

4. Opposite their bungalow was the bungalow in which the appellants lived with their son Bashir Ahmed and certain other persons. This bungalow

also collapsed ; but the appellants extricated themselves from the ruins ; and accompanied by their son hurried across to the residence of Sir

Shamas Shah to find out what had happened there.

5. It is admitted that Sir Shamas Shah and his wife''s sister were already dead when their bodies were recovered from the ruins. It is also admitted

that Mst. Faruq survived the disaster ; as to Lady Shamas Shah, the appellants set up the case that she was ""taken out alive"" when she was

extracted at about the same time when her husband''s body was recovered and that she thus survived him, though she expired immediately

thereafter.

6. The respondents denied that Lady Shamas Shah was ""taken out alive"" from the crumbled bungalow, and that she survived her husband. They

contended that not having survived him, she did not inherit from him and the appellants had no title to the suit property on that ground.

7. The parties are Mahomedans, As Sir Shamas Shah died without ''issue, assuming Lady Shamas to have survived him, his heirs on his death,

under the Mahomedan law, were,

(1) his widow who became entitled to a fourth part of the estate, and

(2) his nephews, the present respondents, who took the remaining three-quarters.

8. On the death of Lady Shamas Shah, her parents, the present appellants, became entitled to the fourth part which she, their daughter, had

inherited from her husband. If she did not survive her husband, then the respondents were entitled to the entire estate.

9. The decision of the dispute thus depended upon the question ""Did Lady Shamas Shah survive her husband,"" and on this basis, issue No. 4 was

framed which was.

Did one-quarter of the property devolve on Lady Shamas Shah on the ground that she survived her husband?

10. The onus of proving the above issue was rightly thrown on the appellants who sought to discharge it (1) by adducing direct evidence of

witnesses who said they saw that Lady Samas Shah was taken out alive from the debris, and (2) alternatively, in the event of the evidence as to her

survival being found insufficient, by relying on what they alleged to be a presumption of law, that where two persons have died in circumstances

rendering it uncertain which of them survived the other, the younger should be deemed to have survived the older, and consequently, that Lady

Shamas Shah being younger of the two should be presumed to have survived her husband. The respondents also adduced evidence in support of

their case.

11. The trial Court held that the evidence adduced by the appellants was not above suspicion, and that there is no presumption in law that in a

common calamity, the younger of the two deceased persons should be deemed to have survived the elder. In the result the suit was dismissed. It

may be mentioned here that there was on record a statement that had been made by Mst. Faruq before a Commissioner, one Mrs. Quasim, who

had been directed by the Court to take her evidence. That statement supports the version of the appellants regarding the survivorship of Lady

Shamas Shah. It is obvious that the statement being that of the only inmate of the bungalow that survived the disaster would, if found true and

acceptable, be of great value in the decision of the case, but it was excluded from consideration by the trial Judge owing to an infirmity that

attached to it. He also refused to summon the said Mst. Faruq as a witness under Order XVI, Rule 14, Civil Procedure Code, under which a

Court in India may, of its own motion, summon as witnesses strangers to the suit, as he was of opinion that the appellants had inexcusably omitted

to examine her. In appeal, the Judicial Commissioners agreed with the trial Judge on all the points urged before them including what was alleged as

the wrongful exclusion of the evidence of Mst. Faruq. They also refused to remand the case for the examination of this witness, Eventually, the

appeal was dismissed, as it was not proved that Lady Shamas Shah survived her husband.

12. In this appeal before the Board, it may be mentioned at the very outset, that Mr. Pritt, the learned Counsel for the appellants, has rightly not

relied on the so-called presumption in law regarding the survivorship of Lady Shamas Shah urged in the Courts below. It is clear to their Lordships

that when two individuals perish in a common calamity and the question arises as to who died first, in the absence of evidence on the point, there is

no presumption in law that the younger survived the elder. As was observed by the Lord Chancellor, Lord Campbell, in the leading English case

on the subject, Wing v. Angrave (1860) 8 H.L.C. 183 :Ã¯Â¿Â½""such a question is always from first to last a pure question of fact, the onus probated

lying on the party who asserts the affirmative"" (p. 198). This rule has not been modified1 in India by any statute as has been in England by Section

184 of the English Law of Property Act, 1925. The learned Counsel however urged that though there is no presumption in law, the survivorship of

the younger should be considered as ""an element in the evidence"" bearing on the question as to who died first. As to this, their Lordships need only

observe that the distinction which the learned Counsel seeks to draw is very thin ; it is obvious that, in a disaster like an earthquake, it is at matter

of pure chance whether the younger or the elder would be killed first. It may well be that the younger might receive injuries which cause

instantaneous death, while the elder might merely be buried under the debris and eventually die of suffocation.

13. The case presented before the Board appears to be one of concurrent findings of fact not involving any substantial question of law, which,

according to the usual practice, would necessarily entail its dismissal; but it was strongly urged by the learned Counsel that the rule is not absolute

and that there are exceptional circumstances in the case which, if attended to, would persuade their Lordships to hold that the findings should be

re-opened. The main argument is that the statement of Mst. Faruq was wrongly excluded from consideration, and that the Board should in the

interests of justice remand the case to India for fresh disposal after taking her evidence. To appreciate this argument, it is necessary that the

circumstances which led to the exclusion of her statement should be examined.

14. The material circumstances are these :Ã¯Â¿Â½A contemplated settlement of the case being found impossible, the Court appointed on December 2,

1937, one Mrs. Quasim as: Commissioner to take the evidence of the appellants ""female witnesses,"" the second appellant, and Mst. Faruq. In

pursuance of that order Mrs. Quasim examined them both on December 19. She appended the following note to the evidence :

Pleader Said Ali Shah (pleader for respondents Nos. 1 and 4) had come to my compounder who informed him that the statement will be taken at

3 p.m. I waited for 15 minutes after which I took the ladies'' statements. No Pleader on either side appeared. Therefore no cross-examination.

Plaintiffs'' attorney present, Agha Chan Badshah.

15. In order No. 11, dated December 20, 1937, the Court noted "" Counsel as beforeÃ¯Â¿Â½.

16. In view of the finding of the Court and request for change of date as Pleaders were ill, she should have postponed recording the statements.

On February 24, 1938, in order No. 13 the following order was passed :

Parties and counsel as before. Plaintiff No. 1 absent again. Furnishes a medical certificate of being unable to attend. Counsel agree to the plaintiff

being examined by open Corn-mission. Issue Commission for K. Section Mir Ahmad Shah to Dr. Nur Ilahi Pleader. For (2) to Dr. Miss RishiÃ¯Â¿Â½.

17. The expression ""For (2) to Dr. ""Miss Rishi"" meant that plaintiff No. 2 was to be examined by Dr. Miss Rishi. She was accordingly examined

on March 27, 1938. On April 14, 1938, after noting the names of the counsel for the plaintiff and defendant, the Court passed the following order :

Two of P. W''s of N. W. F. P. will be produced in Court it is stated. Balance of P. W''s statements will be recorded by Commissioner already

appointed ; also of D. W. Section to be taken by the same Commissioner."" Some more orders were passed respecting the examination of

witnesses and the production of evidence. The appellants and respondents closed their cases on August 25, 1938, and November 2, respectively

and the case was posted to December 7, 1938, for arguments.

18. On the above date, the counsel for the appellants put in an application to the effect that the statement of Mst. Faruq should be recorded. On

this the Senior Subordinate Judge passed a long order which after referring to the relevant orders concluded as follows:

Obviously the statement of Mst, Faruq recorded on December 19, 1938, cannot be admitted in evidence. This must have been obvious to the

plaintiffs" counsel on April 14, J.938, and he should have then asked the Court for orders for the examination of this witness. Counsel for the

plaintiff pleads as unintentional omission and asks me to summon Mst. Faruq as a Court witness under Order XVI, Rule 14 as she is a vitally

important witness. Counsel for defendants object on the ground that the evidence of both parties is closed. It is contended also that the omission

was intentional on the part of the plaintiffst Counsel.

I have considered this question carefully and am of opinion that it would be seriously detrimental to the defendants case to admit this witness at this

stage. I do not consider that it is the duty of the Court to remedy an omission by a party to the suit which may be intentional or if it must be due to

neglect.

19. The following extract from the judgment of the Judicial Commissioners explains their reasons for not considering the statement of Mst. Faruq

and for their refusal to remand the case for examining her :

We are of opinion that the evidence of Mst. Faruq given before Mrs. Quasim cannot be taken into consideration ; nor should the plaintiff be given

a further opportunity of examining her. We cannot presume that the counsel for defendants Nos. 2 and 3 was notified in time so as to appear

before Mrs. Quasim on December 19. These defendants had no opportunity of cross-examining her. It is quite apparent that the plaintiffs were

negligent in not having her examined later. Both she and the 2nd plaintiff had appeared before Mrs. Quasim. When the 2nd commission was issued

to Miss Rishi, the 2nd plaintiff was examined but no attempt was made to get Mst. Faruq examined and counsel for the plaintiffs on two occasions

gave statements which show clearly that all the evidence which was to be taken at Peshawar had been completed. We are not prepared to remand

the case for the examination of this witness and we cannot take the evidence which she gave before Mrs. Quasim into consideration.

20. It appears to their Lordships that full and cogent reasons have been given by the learned Judges for rejecting the evidence of Mst. Faruq and

for refusing to call her as a Court witness. It is true that counsel for respondents Nos. 1 and 4 knew that the Commissioner would examine her on

December 19, but it is not a necessary inference from this that the counsel for respondents Nos. 2 and 3 who was a different individual had timely

notice of the information, Indeed it would be very dangerous to act upon the evidence of this witness as it had not been subjected to cross-

examination. The Senior Subordinate Judge indicated his opinion to the parties at a very early stage that Mrs. Quasim should not have recorded

the statement of Mst. Faruq on December 19. In consequence, when Miss Rishi was appointed as Commissioner, appellant No. 2 who had

already been examined on December 19 by Mrs. Quasim was examined afresh by the appellants, but not Mst. Faruq. The evidence of both these

witnesses was subject to the same infirmity. No reasonable explanation for the omission to examine this witness before Miss Rishi has been

offered. It may be that the appellants did not want her evidence at all, for reasons best known to themselves, or that they thought that she might be

produced and examined in Court. Referring to his order passed on April 14, 1938, the Senior Subordinate Judge remarks ""orders were also

passed for the examination of those of the witnesses who were residing outside N.W.F.P. In this order no mention is made of Mst. Faruq who was

residing in Peshawar City."" There is great force in the observation of the Judicial Commissioners that the appellants would seem to have

abandoned the idea of producing Mst. Faruq in Court. On August 25, 1938, their counsel filed the statement that;their case was closed, and the

request that the statement of Mst. Faruq should be recorded was made on December 7, when the case was taken up for argument, more than a

month after the respondents had closed their case on November 2, 1938. In the circumstances, the Courts below were right in rejecting her

evidence. It also appears to their Lordships that they were right in not acceeding to the request of the appellants to examine Mst. Faruq, whether

their omission to examine her was intentional or due to neglect. The power of the Courts unedr Order XVI, Rule 14, Civil Procedure Code, to

examine witnesses on its own motion is discretionary. The Courts in India have in this case for very good reasons refused to exercise their

discretion in favour of the appellants, and their Lordships also are not prepared to exercise it. No case has been made out for re-opening the

concurrent finding of the Courts below that it has not been proved that Lady Shamas Shah survived her husband. In the circumstances, their

Lordships would accept the finding and humbly advise His Majesty that this appeal should be dimsissed with costs.