

BOMBAY HIGH COURT

Jayawant Jivanrao Deshpande

Vs

Ramchandra Narayan Joshi

(Basil Scott, C.J. Shah, J.)

30.09.1915

JUDGMENT

Basil Scott, C.J.

1. 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 first 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 No. 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 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 ejection of the defendants.

2. The first Court decided the case in favor 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.

3. 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 Indian Limitation Act.

4. 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 remainder man 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 Indian Evidence Act.

5. 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 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: 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;

6. 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.

7. 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.

8. That case appears to us to be directly in point.

9. The decision of the Appeal Court in *re Phene's Trusts*² 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*³. There is more to be said for the view of Malins, V.C. where the law is as stated in Sections 107 and 108 of the Indian Evidence Act.

10. The criticism of Giffard, L.J., does not, however, affect the direct application of the judgment in *Nepean v. Deo d. Knight*⁴ 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 Indian Evidence Act.

11. 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.

Cases Referred.

1(1837) 2 M. & W. 894 : 7 L.J. Ex. 335; I M. & H...291 : 2 Sm. L.C. 558 : 46 R.R. 789 : 150 E.R. 1021

2(1870) 5 Ch. 139 : 39 L.J. Ch. 316 : 22 L.T.111 18 W.R. 303

3(1867) 4 Eq. 410 : 36 L.J. Ch. 502 : 16 L.T. 349 : 5 W.R. 741

4(1837) 2 M. & W. 894 : 7 L.J. Ex. 335 : I M. & H...291 : 2 Sm. L.C. 558 : 46 R.R. 789 : 150 E.R. 1021