

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moolla Cassim bin Moolla Ahmed v. Moolla Abdul Rahim and others, from the Chief Court of Lower Burma; delivered the 26th July 1905.*

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Present at the Hearing :

LORD DAVEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Andrew Scoble.*]

Moolla Hashim, a wealthy Mahomedan resident at Rangoon, on the 13th of May 1878 executed a will by which (*inter alia*) he bequeathed certain property to his eldest son Moolla Ahmed and his two children. After the death of Moolla Hashim, which occurred on the 27th of January 1884, while he was on pilgrimage to Mecca, one of his widows, named Shareefa Bee, disputed the validity of the will, as not being in accordance with Mahomedan law, and it was ultimately referred to one Moolla Ismail, as arbitrator, to divide the property among those whom he should find entitled to share in it. He made his award on the 21st February 1888, and in it he included Moolla Ahmed and his children among "the heirs and legatees" among whom the estate of the deceased was to be distributed.

It is a well-known principle of Mahomedan law that if any of the children of a man die before the opening of the succession to his estate, leaving children behind, these grandchildren are entirely excluded from the inheritance by their uncles and aunts. In the present case,

Moolla Cassim, the only son of Moolla Ahmed, claims a share in his grandfather's estate, in right of his father, under Moolla Ismail's award. In his plaint he states that he "is informed and verily believes that the said Moolla Ahmed left Rangoon in or about the year 1870 as a mendicant or fakir, and has not since that date returned to Rangoon"; that he last heard of him in or about the year 1886 or 1887, when he was reported to be in Bangkok, Siam; that he has not since been heard of, "and, according to the presumption of law, his death took place about 1891." The Defendants are the surviving executors and heirs of Moolla Hashim, or the legal representatives of such of them as have died since his death, and they allege in their written statement that Moolla Ahmed "has never been heard of since his disappearance in the year 1870," and they submit to the Judgment of the Court whether he may "now be considered as dead."

Both Courts in Burma held that the Plaintiff had failed to prove that Moolla Ahmed had been either seen or heard of after 1870, and that under the provisions of Section 108 of the Indian Evidence Act, 1872, the burden was on him to establish that his father had survived his own father Moolla Hashim. They accordingly dismissed the suit with costs. These concurrent findings would ordinarily have sufficed to dispose of this Appeal, but it was argued before their Lordships that the Courts below had failed to give proper effect to the circumstances of the reference to Moolla Ismail, and to the terms of his award, both of which, it was said, postulated that Moolla Ahmed was alive at the date of those transactions, and that he had therefore survived his father. The first observation that their Lordships have to make upon this contention is that the arbitrator was not called as a witness, though

living at Mandalay, nor was he examined upon commission; secondly, that the agreement of reference has not been produced, and there is nothing to show that Moolla Ahmed was a party to it; and in the third place, there is nothing in the terms of the award that can properly be construed as evidence that Moolla Ahmed was alive when the award was made. It is true that the award states that "the deceased left six "sons and five daughters," but it would be unwarrantable to treat an uncorroborated statement of this kind as proof that the arbitrator had satisfied himself that all Moolla Hashim's children were still living. It is true also that the arbitrator in his award reserved a share for Moolla Ahmed and his children, but this is quite intelligible on the ground that, according to Mahomedan law, a share ought to be reserved for a missing heir. Their Lordships agree with the Chief Court in the opinion that "the effect "of the award was to recognise that Moolla "Ahmed was missing, and to set aside his share "until he should be found, or be proved or "declared by competent authority to be dead"; and their Lordships are, with the Chief Court, unable to see how the proceedings in the arbitration "can be regarded as an admission "on the part of the other heirs, or as a finding "by the arbitrator, that Moolla Ahmed was then "alive."

Their Lordships will humbly advise His Majesty that this Appeal ought to be dismissed and the Judgment of the Chief Court confirmed. The Appellant must pay the costs of the Appeal, including the costs of the Appellant's petition for leave to file additional evidence.

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