
(1970) 11 KL CK 0015
In the High Court Of Kerala
Case No : S.A. No"s. 86 and 87 of 1965

Appula Vadhyar Narayana Vadhyar	Vs	APPELLANT
Venkateswara Vadhyar and Others		RESPONDENT

Date of Decision : 10-11-1970

Acts Referred:

Evidence Act, 1872 — Section 107, 108

Citation : AIR 1971 Ker 85

Hon'ble Judges : V.P. Gopalan Nambiyar, J;T.S. Krishnamoorthy Iyer, J;K. Sadasivan, J

Bench : Full Bench

Advocate : A.S. Krishna Iyer and A.K. Ramaseshadrinathan, in S.A. Nos. 86 and 87 of 1965, for the Appellant; S. Venkitarajan in A.S. No. 86 of 1965 and S.K. Brahmanandan, in A.S. No. 87 of 1965, for the Respondent

Final Decision : Dismissed

Judgement

Krishnamoorthy Iyer, J.—S. A. 88 of 1965 arises out of O. S. m of 1958 on the file of the Subordinate Judge's Court, Ernakulam and the plaintiff therein is the appellant.

2. S. A. 87 of 1965 arise out of O. S. 55 of 1958 on the file of the Subordinate Judge's Court. Ernakulam and the appellant is the plaintiff therein.

3. The plaintiff in both the suits is the same. Yogia Vadhyar had three sons Narayana Vadhyar, Narasinga Vadhyar and Krishna Vadhyar. Krishna Vadhyar died in 1067 leaving behind his widow Sathyabhama and daughter Padmavathi alias Puthi. Sathyabhama died in 1107. Thereafter Padmavathi died leaving behind two sons the plaintiff and his elder brother Vasudeva Vadhyar, The properties in the two suits were allotted to the share of Krishna Vadhyar in the family partition. O. S. 131 of 1958 is to set aside Ext D1 sale deed dated 31-1-1090 executed by Sathyabhama and Padmavathi the latter also acting as the guardian of her minor sons in respect of the property in, that suit in favour of Madhava Vadhyar, O. S. 55 of 1958 is to set aside Ext. P1 sale deed dated

31-10-1081 executed by Sathyabhama and Madhava Vadhyar regarding the property in that suit. The averments in both the complaints are that Padmavathi left her native place in 1092 to an unknown destination and since then she was not heard of and information was received that she died at Calcutta on 27-2-1951.

4. It was contended for the defendants that the suits are barred by limitation and adverse possession, and that Padmavathi died more than 12 years prior to the suits

5. The suits were dismissed on the ground that they are barred by limitation because the plaintiff has not proved that the suits were filed within 12 years of the death of Padmavathi. The courts below concurrently found that the averment of the plaintiff that Padmavathi died on 27-2-1951 is not correct.

6. The lower courts took the view that u/s 108 of the Indian Evidence Act if a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive the presumption is only that he is dead and there is no presumption as to the date of his death, following the decision of the Travancore-Cochin High Court in *Sarojini v. Sivanandan* 1956 K L.J 126 : (AIR 1956 TC129). The said decision has been followed by this Court in *Philip v. Kunju Kesavan*. 1958 K LT 8. In the latter case Kumara Pillai, J. with whom Vaidialingam, J. concurred observed:

"We are in agreement with the views set out in 1956 K LT 126 : AIR 1906 TC 129 and AIR 1957 AP 380 and hold that no presumption can be drawn under Sections 107 and 108 of the Evidence Act as to whether a person was dead or alive on any particular date or at any particular time before the date of the suit in which that question is raised and that the rule of decision in such cases should be whether the party seeking to enforce in the suit a right flowing out of the existence or death of the person concerned has discharged the onus of proof on him which is essential for the establishment of his right--that is to say, the plaintiff asking relief in a suit on account of a right flowing from, the death or existence of a particular person on a particular date or at a particular time must affirmatively prove that that person was dead or alive, as the case may be, on the particular date or at the particular time."

The correctness of the above decision was canvassed before us.

7. Though the decision in 1958 KLT 8 was confirmed by the. Supreme Court in *Kunju Kesavan Vs. M.M. Philip I.C.S. and Others*, their Lordships did not express an opinion on the scope of the presumption arising under Sections 107 and 108 of the Evidence Act.

8. Sathyabhama had a widow's, estate in the properties of her husband and after her death Padmavathi succeeded to the same taking a woman's estate. The plaintiff stated in the complaints that Padmavathi was not heard of since 1092 and she died on 27-2-1951. The suits were instituted in 1958. The contention of the plaintiff's counsel was that when both parties have failed to prove the date on

which Padmavathi died it should be presumed that she died on the date of the institution of the suits. If the plea is accepted the court will have to presume that Padmavathi died on two different dates as the dates on which the suits were instituted are different. And that too in spite of the fact that the plaintiff stated that Padmavathi died on 27-2-1951.

9. The onus is on the plaintiff to prove that the suits were instituted within 12 years of Padmavathi's death. The suits are beyond 12 years from the dates of the documents impeached.

10. We shall now quote Sections 107 and 108 of the Indian Evidence Act:

"107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that is shifted to the person who affirms it."

There is nothing in the language of Section 108 for the view that if the date of death is not proved by any of the parties the early date on which the death could be presumed is the date on which the suit was filed.

11. Section 108 of the Indian Evidence Act has its origin in English law. The law in England was stated thus in *In re Phene's Trusts* (1870) 5 Ch A 139:

"If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

In *Halsbury's Laws of England* (Simonds' Edition), Vol. 15, at paragraphs 623 and 624 the learned author observed:

"There is no presumption of law by which the fact that a particular person was alive on a given date can be established, it being in every case a question of fact for the jury or judge sitting alone.

There is no legal presumption either that the person concerned was alive up to the end of the period of not less than seven years, or that he died at any particular point of time during such period, the only presumption being that he was dead at the time the question arose, if he has not been heard of during the preceding seven years. If it is necessary to establish that a person died at any particular date within the period of seven years, this must be proved as a fact by evidence raising that inference;

The above view has been reiterated in *Chipchase v. Chipchase* 1939 3 All ER 895 and *Watkins v. Watkins* 1953 2 All ER 1113. Their Lordships of the Judicial Committee in *Lal Chand v. Ramrup Gir* AIR 1926 PC 9 after stating

"there is only one presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof."

proceeded thus:

"Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England (*Rango Balaji v. Mudiyeppa* ILR (1899) 23 Bom 296 and searching for an explanation of this very persistent heresy, their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trusts* (1870) 5 Ch A 139 runs as follows:--

"If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

Following these words, it is constantly assumed--not perhaps unnaturally--that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This, of course, is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years".

The date of death has therefore to be proved as any other fact by the person on whom the burden lies to establish the said death. The exact time of death is not a matter of presumption. The view taken in 1958 K LT 8 and 1956 KLT 126 : AIR 1956 TC 129 is only consistent with the principle of law stated by their Lordships of the Judicial Committee. We do not find any convincing reason to deviate from the line of reasoning adapted in 1958 K LT 8 and accept the contrary view taken in some of the cases including *Smt. Narbada and Another Vs. Ram Dayal*, cited for the plaintiff.

12. We therefore dismiss the second appeals. We make no order as to costs.