
(1996) 10 MAD CK 0080
In the Madras High Court

Balambal

APPELLANT

Vs

Kannammal alias Pazhaniammal (Died) and Another

RESPONDENT

Date of Decision : 14-10-1996

Acts Referred:

Evidence Act, 1872 — Section 107, 108, 111, 114
Specific Relief Act, 1963 — Section 34

Citation : (1997) 1 LW 489 : (1997) 1 MLJ 181

Hon'ble Judges : Raju, J

Bench : Division Bench

Judgement

Raju, J.—The above second appeal has been filed by the second defendant in O.S. No. 70 of 1977 on the file of the I Additional Subordinate Judge, Pondicherry.

2. The second defendant appellant is indisputably the daughter of late Sambasiva Pathar through his first wife Angammal, who was said to have died in 1931. Thereafter Sambasiva Pathar married for the second time one Saraswathi who had no issues and after her death, married Kannammal the plaintiff who was said to have begotten one son by name Ramalingam and one daughter Kokilamballe the first defendant. Sambasiva Pathar died in 1952 and Ramalingam was the only male issue. He was said to be studying in Loyola College of Madras and from there he was missing from 27.2.1964. Neither he returned any time thereafter nor was he heard of by his mother, his relatives and friends in spite of his mother—the plaintiff having taken all steps to find out her only son. It was also claimed that the mother not only caused search and enquiries to be made in the house of relatives but wide publicity in the Press was also given in addition to the complaints made to the police and the correspondence entertained with the college authorities at Madras, and also the Ministry of Home Affairs, New Delhi and with several Mutts. Since Ramalingam disappeared without giving any clue of his existence till the date of the suit, he was presumed to be dead as per law. During the absence of the said Ramalingam, the plaintiff had to administer all the properties of her son and accordingly she also obtained an order from the French Court appointing her as a court guardian, on 2.12.1966. But even after 10 years

of the same, the whereabouts or the information as to existence of Ramalingam was not known. Taking advantage of the extension of the provisions of the Hindu Succession Act and Evidence Act to the Union Territory of Pondicherry, the plaintiff has filed the suit in question for a declaration of the civil death of the plaintiff's only son and consequential declaration that the plaintiff being the only heir of her son, is the absolute owner of the suit schedule properties.

3. The first defendant the daughter of the plaintiff and the sister of Ramalingam, submitted to a decree. The second defendant, as noticed earlier, the daughter of the plaintiff's husband late Sambasiva Pathar through his first wife filed a written statement contending that it is true that the whereabouts of Ramalingam are not known and he was missing, but such missing of Ramalingam was on account of the behaviour and conduct of the plaintiff mother and he will appear soon after the death of the plaintiff and therefore Ramalingam should not be presumed to be dead and the plaintiff alone is not the successor to Ramalingam. The suit was alleged to have been filed by the plaintiff in collusion with the first defendant and that the plaintiff is in enjoyment of the properties on behalf of the absentee Ramalingam pursuant to the appointment made as Receiver. An additional written statement was also filed contending that Ramalingam is alive and therefore, the court has no jurisdiction to entertain the suit in respect of the relief of the declaration of the civil death of Ramalingam and Section 108 of the Evidence Act is not applicable because Ramalingam is alive within 30 years and was missing from 1964 only from Madras and consequent";", the suit was not maintainable in respect of the second relief. A reply, was also filed by the plaintiff contending that the Evidence Act became applicable to civil cases also from 1963 in the Union Territory of Pondicherry and that the claim of declaration on the basis of civil death of her son was under the Hindu Succession Act and the Indian Evidence Act and not under the French Law and the accusation of immoral life made by the second defendant was baseless. Under the provisions of Section 34 of the Specific Relief Act, the plaintiff was entitled to a declaratory decree.

4. On the above claims and counter claims, the suit came to be tried and oral and documentary evidence was adduced on the side of the plaintiff and the contesting defendant adduced only oral evidence on her side. Learned trial Judge by his judgment and decree dated 6.12.1979 decreed the suit as prayed for overruling the objections of the second defendant on the ground that she has not discharged her burden of proving her claim as against the proof successfully said to have been made by the, plaintiff of her claim and entitlement to the relief prayed for on the basis of the civil death of her son Ramalingam.

5. Aggrieved, the second defendant filed on appeal in A.S. No. 27 of 1980 before the District Court, Pondicherry. Learned I Additional District Judge of Pondicherry, by his judgment and decree dated 22.7.1982, confirmed the findings and conclusion arrived at by learned trial Judge and placing reliance upon Exs. A-2 and A-7 to A-13, held that the disappearance of the plaintiff's son by name Ramalingam from 27.2.1964 till the date of consideration by the courts below

proved, that the disappearance might have been occasioned also by the fact that the college in which he was studying in B.A. History II year did not send up Ramalingam for University Examinations to be held in March, 1964 due to his poor academic performance and that having regard to the provisions contained in Section 34 of the Specific Relief Act, 1963, made applicable from 13; 12 1963 and the provisions of the Indian Evidence Act made applicable with effect from 1.10.1963, the India laws applied to the case on hand and consequently, the decree passed by the learned trial Judge was in accordance with law.

6. Not satisfied, the second defendant has come up before this Court. Learned Judge, dealing with this appeal at the time of admission, considered that the appeal involved consideration of three substantial questions of law as to whether the suit as framed was maintainable in law seeking a declaration that a person is civilly dead on the ground that he was not heard of for seven years and more so without consequential relief, whether the courts in Pondicherry have jurisdiction to entertain the suit in so far as it relates to the declaration of civil death of Ramalingam and whether the courts below were right in holding that the French Civil Code is not applicable to the case on hand.

7. Mr. V. Prabakar, learned Counsel appearing for the appellant contended regarding the maintainability of the suit in a different form and tangled altogether and though admittedly, such issue in them that Court was not urged before courts below having regard to the fact that the point sought to be urged by learned Counsel for the appellant was a substantial question of law going to the root of the matter, I allowed him to argue the same and learned Counsel for the respondents was also given sufficient time to meet the new aspect of the maintainability urged by learned Counsel for the appellant. The sum and substance of the only ground of challenge projected and pursued at the time of hearing of the appeal is that the provisions contained in Sections 107 and 108 of the Indian Evidence Act are more procedural in nature delineating merely procedure or mode of proof to be adopted in case any dispute about the existence or otherwise of a person is involved and being a rule of procedure the presumption engrafted in Sections 107 and 108 of the Evidence Act cannot by itself be the basis or part of the claim of substantial relief itself before a civil court and therefore, the very suit is liable to be dismissed.

8. Per contra, learned Counsel for the respondents Mr. T.P. Manoharan contended that the law does not preclude such a relief being asked along with a consequential relief of declaration of her right to the properties as the heir of the missing person who was her son and at any rate, the facts and circumstances squarely justify the relief sought for and granted by the courts below in favour of the plaintiff and that there are no merits whatsoever in the attack made against the judgments of the courts below in this appeal.

9. Mr. Prabakar, learned Counsel for the appellant has really made some commendable exercise in getting at the relevant case law on the subject in his attempt to project his claim on behalf of the appellant and learned Counsel for

the respondents has also contributed his part by producing some of the decisions to which reference can be made though not in great detail.

10. The decision in *Lai Chand Marwari v. Mahant Ramrup Gir* AIR 1926 PC. 9, was Privy Council one arising out of a case decided by the Patna High Court reported in *Ramrup Gir v. Lal Chand Marwari* AIR 1922 Pat. 243; wherein it has been observed by the Privy Council that there is no presumption that a person not heard of for seven years was dead at the end of 7 years and where the plaintiff in that case claimed as heir to the life-holder who was not heard of for over 7 years and defendants were found to be in possession for over 12 years, the plaintiff was to prove the date of death within 12 years of the suit vis-a-vis Article 144 of the Limitation Act, 1908. In *Jumilal v. Mt. Halki* AIR 1924 Nag. 387, a Division Bench of that court held that the relief of declaration being a discretionary relief, courts are not ordinarily prepared to grant such relief where it would be only by way of anticipation or where the main basis of the plaintiff's complaint have failed. It was also observed therein that a declaration of the plaintiff being the next presumptive heir of the last holder was one such, and need not be granted.

11. In *Smt. Narbada and Another Vs. Ram Dayal*, a learned single Judge of that court has held while dealing with Section 108 of the Evidence Act that the provision relates to question of burden of proof cannot be missed and at the earliest be drawn when the dispute is raised and brought before the court and cannot be given a further retrospective effect. The question as to when a particular person died was held to be always a subject matter of proof like any other fact. In *N. Prem Ananthi Vs. Tahsildar, Coimbatore and Others*, a learned single Judge of this Court held that a presumption of death u/s 108 of the Evidence Act could be made only if it is proved at the time when the presumption is sought to be raised before a court and no person can make use of the said presumption to get an entry made in the Register of Deaths and Births by the Registrar concerned that such person was dead and the certificate issued by the Revenue Officials of such civil death was interfered with by this Court. In *Tadepalli Ram Rathnam Vs. Kantheti Varadarajulu and Others*, a learned single Judge of the Andhra Pradesh High Court held that the presumptions about continuance of life and of death envisaged under Sections 107 and 108 of the Evidence Act are always buttable one and Section 108 in a sense is by way of a proviso to Section 107. It was also observed therein that the exact time of death, however, is not a matter of presumption but it is a matter of evidence. In *C. Abdul Jabar Sahib v. Abdul Hafiz Sahib* (1993) 2 M.L.J. 282, a Division Bench of this Court had dealt with the respective scope of presumption under Sections 107 and 108 and as to when they come into play and held that Section 107 deals with the presumption of continuation of life whereas Section 108 deals with the presumption of death and both the presumptions come into play after a suit is instituted. While initially the presumption of life extends over the whole period of thirty years, but when it is displaced, the presumption of death, extends over the whole period when the person is unheard of. The exact time of both is not a

matter of presumption but is a matter of evidence. In *N. Jayalakshmi Ammal and another Vs. R. Gopala Pathar and another*, , the Apex Court was dealing with an appeal from this Court from the decision in *R. Gopala Pathar Vs. N. Jayalakshmi Ammal and Others*, . Their Lordships of the Apex Court held that there was not presumption u/s 108 of the Evidence Act that the person who was not heard of for more than 7 years, had died on any exact time of death and such position has to be established on evidence by the person who claims a right that the establishment of that fact is essential. Such observation came to be made in that case in the context of the right claimed on the basis of a title said to have been acquired on coming into force of the Hindu Women's Right to Property Act on 14.4.1937. In *American Express Bank Ltd. Vs. Calcutta Steel Co. and Others*, , the Apex Court had occasion to deal with the case of grant of relief of declaration u/s 34 of the Specific Relief Act, 1963 and held that discretionary power of court has to be exercised with circumspection, *ex debito justitiae*, having regard to pros and cons in the facts and circumstances of each case and the court also cannot convert itself into an instrument of injustice or vehicle of oppression. Their Lordships also emphasised the need, while exercising the discretionary power of courts, to keep in mind the well settled principles of justice and fair play and the discretion exercised keeping in view the ends of justice since justice is the hallmark and it cannot be administered in vacuum. In *Sodhi Transport Co. and others Vs. State of U.P. and others*, , the Apex Court while dealing with the claim of presumption under Sections 111 and 114 of the Evidence Act observes that presumption is not itself an evidence. It only makes a *prima facie* case for party in whose favour it exists and it is a rule. concerning evidence which also indicates the person on whom the burden of proof lies. It was also observed therein that when presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts and it is only when it is a rebuttable presumption the provisions further pointed out the party on whom lies the duty of going forward with the evidence on the fact presumed and when the party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. The rules of presumption are said to be deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts and circumstances.

12. Mr. T.P. Manoharan, learned Counsel for the respondents relied upon the decision reported in *Ramesam v. Achara Naicken* 41 M.L.J. 295 wherein a Division Bench of this Court held that in a case where the point of time to which death has to be referred there is a presumption after the lapse of seven years in favour of the death and it is for the other side to displace the presumption and the party relying on the presumption is entitled to succeed if no evidence is offered by the other side. In that case, the plaintiff appears to have shown that one "T" who had not been heard of for a period of 7 years with the conclusion of August 1918, the plaintiff was held entitled to succeed.

13. In *Venkatasubba Rao v. Jaladi Burreyya* 43 M.L.J. 725, yet another Division

Bench of this Court dealt with a case where the person who was not heard of and the presumption of death became available after the coming into force of the Indian Evidence Act, and advertent to the rule of Hindu Law in vogue that at least 12 years should lapse before a man unheard of should be treated as dead held the same was inapplicable after the coming into force of the Evidence Act, but that the 7 years rule u/s 108 of the Act alone applied and since one "K" in that case has not been heard for 10 years before the suit, he must be presumed to be dead on the date of the suit.

14. In *Huseinny J. Bhagat and Another Vs. Life Insurance Corporation of India, Madras, Ananthanarayanan, O.C.J.*, while dealing with the scope of Section 108 observed that Section 108 is founded upon the principles of the English Common Law and therefore, the burden is on the person who asserts that a person is living when such a person has disappeared and has not been heard of for more than seven years and that it cannot be laid in India as a general principle of law applicable to all cases that where a person has disappeared and has not been heard of for seven years the presumption of death might be made not merely with reference to the point of time at which the question arose after the expiry of 7 years, but even with reference to the point of time when the person actually disappeared without any other light being thrown upon the facts of that disappearance.

15. I have carefully considered the submissions of learned Counsel appearing on either side.

Learned Counsel appearing on either side, would agree that the manner in which the claim is projected by learned Counsel for the appellant in this case was not directly under consideration in the above referred to decisions. Learned Counsel for the appellant would emphasize that the main relief claimed before the courts should be something else than a declaration about the civil death of the missing person and that the benefit of the presumption should be claimed by one or the other of the parties in the proceedings and to that extent only, the presumption under Sections 107 or 108 have their roles to play and cannot be the basis or part of the main relief itself. In my view, de hors the tenability or otherwise of such a submission, the relief sought for in this case, at any rate, does not suffer any for in this case, at any rate, does not suffer any such infirmity. The relief claimed is not simpliciter for a declaration about the civil death of Ramalingam the son the Plaintiff in this case. Though the relief of declaration of the right of the Plaintiff as heir to the deceased son Ramalingam was sought for as a consequence, a reading of the case projected in the plaint would go to show that the very object of the declaration is only to have the substantive relief of declaration that the plaintiff is the only heir of her son and as such the absolute owner of the suit schedule properties which constitute the main and substantial relief and the declaration of civil death being almost merely incidental, and the language employed being the word "consequential" does not in any manner detract from the declaration of property rights of the plaintiff being the main and

substantial relief. Viewed thus, the challenge made to the nature of relief sought for and granted does not in any manner suffer from the infirmities sought to be attributed on behalf of the appellant. The challenge made on behalf of the appellant, relying upon the manner of declaration of civil death being asked for in the beginning of the relief portion cannot be given undue emphasise to non-suit the plaintiff in the present proceedings and accepting such a submission would amount to abrogating the principles of justice and fair play and allowing technicalities of form to overtake and defeat the ends of Justice for getting the real role of courts as the administrators of which, for which alone the courts do exist.

16. As far as the facts and circumstances of the case on hand are concerned, the plaintiff is the mother of Ramalingam whose whereabouts is not known from 17.2.1964 when he admittedly disappeared from the college. The suit initially filed on 18.3.1977 was itself nearly about 13 years thereafter and as on date, it is three decades since the disappearance of Ramalingam, plaintiff's son and there is no information worth evidence about the whereabouts, existence or otherwise of him even now. It is not the case of the appellant that any such information is forthcoming and it could be safely presumed there was none forthcoming even subsequently, otherwise, the appellant fighting the case jealously would have come up with any application for adducing additional evidence, and the missing person also would not sleep over without asserting his rights by making appearance. In the teeth of the above indisputable circumstances and the lapse of (nearly three decades, I am of the view that the judgments and decrees of the courts below could not be said to be vitiated in any manner calling for interference on account of any infirmity of law or on facts. The second appeal therefore fails and shall stand dismissed. No costs.