

(1917) 04 MAD CK 0001
In the Madras High Court

Ponnaloori Ellamandayya

APPELLANT

Vs

Chilakapathi Lakshmayya and Others

RESPONDENT

Date of Decision : 20-04-1917

Acts Referred:

Evidence Act, 1872 — Section 108

Citation : 42 Ind. Cas. 241 : (1917) 6 LW 633

Hon'ble Judges : Seshagiri Aiyar, J; Bakewell, J

Bench : Division Bench

Judgement

1. This is a suit by a person alleging himself to be a reversioner for possession. The widow of the last male owner died in 1909. The suit was

instituted in 1912. The defendants among other pleas stated that one Guruviah alias Gurunadban, a nearer reversioner, was alive when the widow

died and that the plaintiff was excluded by him. In answer to this averment the plaintiff stated that Guruviah was not heard of for thirty years and

that the presumption, therefore, was that he was dead in 1909.

2. The Courts below, in our opinion, rightly held that although Guruviah was not heard of for thirty years before suit, there was no presumption that

he was dead in 1909,

Mr. Rajagopalachariar, who has argued this case with great insistence, contested this proposition. He argued that the presumption must be raised

with reference to the event which is the basis of the action, and not with reference to the date of the suit. The language of Section 108 of the

Evidence Act, in our opinion, does "not support this contention. The word question in that section has reference to the point raised in the suit. The

law of evidence prescribes rules for the mode of proof in Courts, and it is with

reference to the matter that is in issue in the suit, the rules are to be applied. The authority of Mookerjee, J., in *Srinath Das v. Probhat Chandra Das* 6 Ind. Cas. 244. *Narki v. Phejcia* 5 Ind. Cas. 709: 11 C. L. J.

138. and *Muhammad Sharif v. Bande Ali* 11 Ind. Cas. 474 all support this proposition. *Band Veeramma v. Gangala Chinna Reddi* 16 Ind. Cas.

43. approves of the Calcutta and the Allahabad decisions. The learned Vakil for the appellant has not convinced us that these decisions are wrong.

He strongly relied on the decision of Karamat Husain, J., in *Akbari v. Bashir Ali* 8 Ind. Cas. 55. The view of the learned Judge was expressly

overruled by the Pull Bench in *Muhammad Sharif v. Bande Ali* (3). Further it is clear that the learned Judge has misread the decision in *Phene's*

Trusts, In re (1870) 5 Ch. App. 139. upon which he based his conclusions. The statement of law by Lord Justice Giffard at page 151 of that

volume leaves no room for doubt that it is for a party, who wants the Court to presume in the trial that a person was dead at a particular time, to

establish that position.

3. *Neville v. Benjamin* (1902) Ch 723. does not help the appellant. In that case it was found that the son of a testator was not heard of since 1892.

The testator made a Will and died in 1493. The administrators of the son's estate claimed the legacy made to the son in the Will. It was held that

they should prove that the son was alive in 1893 when the father died. This is also what Section 108 lays down. The principle to be applied in such

cases is clearly laid down by Sir G. M. Giffard, L. J., in *Phene's Trusts*, In re (6) in these terms: ""The true proposition is, that those who found a

right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in

different cases, but sufficient evidence there must be, or the person asserting title will fail"". Applying this test, we hold that the appellant has failed to

prove that Guruviah was dead in 1909.

4. Another contention of the learned Vakil is that his client should have been allowed to amend the plaint by claiming title as the heir of Guruviah.

We see no reason for interfering with the discretion of the lower Appellate Court in this matter. Moreover, there is no guarantee that the plaintiff is

the sole heir of Guruviah because as was pointed out in *Jackson v. Ward* (1907) 2 Ch. 364. there is no presumption arising from the presumption

of the death of an individual that he left no heirs behind him.

5. We hold that the Courts below are right and dismiss the second appeal with costs.

Appeal dismissed. V.R.P.