
(1962) 07 KAR CK 0010
In the Karnataka High Court
Case No : Second Appeal No. 411 of 1958

Shankareppa

APPELLANT

Vs

Shivarudrappa and Others

RESPONDENT

Date of Decision : 27-07-1962

Acts Referred:

Evidence Act, 1872 — Section 107, 108

Citation : AIR 1963 Kar 115 : (1962) ILR (Kar) 630 : (1963) 1 MysLJ 297

Hon'ble Judges : K.S. Hegde, J; Ahmed Ali Khan, J

Bench : Division Bench

Advocate : S.C. Javali, for the Appellant; V.C. Mahajan, for Respondents 2 to 5, for the Respondent

Judgement

1. This appeal which raises an interesting question of law about which there is considerable conflict of judicial opinion was referred to a Bench by Kalagate, J and therefore it is before us. In this appeal the true scope of Section 107 of the Evidence Act comes up for consideration.

2. The facts of the case are no more in dispute. Both the Courts below have concurrently come to the conclusion that Parappa the propositus died a few years prior to the suit. He had four sons, viz., Irappa, Maharudrappa, Shivalingappa and Mallappa. Even during the lifetime of Irappa there was a partition in his family. Under the partition the family properties were divided only between the four sons. The two survey numbers, viz., 577/2 and 579/2 of Sattigeri village in Belgaum District had been given to Parappa for his maintenance. In other words these two survey numbers remain undivided. The evidence discloses that Irappa was slightly demented; that he left the family house long time back and that he had not been heard of for about twenty years prior to this suit. At the time he disappeared he had left behind him his wife Somawwa and a young son. That son died 2 or 3 years after Irappa disappeared. Thereafter In the year 1950 Somawwa adopted the plaintiff to her husband Irappa, assuming that Irappa is dead. After the adoption in question the plaintiff brought suit No. 143/1954 on

the file of the Civil Judge, Junior Division at Bailhongal claiming half share in survey numbers 577/2 and 579/2 on the allegation that he had purchased the 1/4th share of Maharudrappa and that he is entitled to a further 1/4th share as the adopted son of Irappa. In that suit the Court granted only a 1/4th share to the plaintiff. His claim as the adopted son of Irappa was negated as the Court was of the opinion that he had not satisfactorily established that Irappa was dead on the date of his adoption.

3. In view of the decision in Suit No. 143/1954 Somawwa again adopted the plaintiff on 15-8-1955. On the basis of that adoption the plaintiff has brought the present suit. Both the Courts below have held that the factum of adoption is proved. The trial Court decreed t-he plaintiff's case. In appeal the plaintiff's suit was dismissed on the ground that the evidence on record is insufficient to establish that Irappa was dead on or before 15-8-1955, i.e., the date of adoption. The first appellate Court has agreed with the trial Court that for about 20 years prior to the adoption, Irappa was not heard of by persons who should have heard of him if he was alive; but, in its view the only presumption that could be drawn u/s 108 of the Evidence Act, if the requirements laid down are satisfied, is that the person whose death is in issue is presumed to have been dead on. the date of the suit. That presumption according to the first appellate Court is not sufficient to prove that Irappa was dead on the date of the adoption. The question for our decision is whether the view of the law taken by the first appellate Court is correct.

4. Undoubtedly it is for the plaintiff to prove that he had been validly adopted by Somawwa. In order to satisfy that requirement, he has to prove that Irappa was dead on or before 15-8-1955. Section 3 of the Evidence Act says that--

"A fact is said to be "proved" when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

In proving a fact in issue a party can take assistance from the presumptions arising u/s 114 of the Evidence Act which says :-

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The assistance of this provision is also available to party who has to establish the factum of death of any particular person. See Badal and Others Vs. Saraswati and Others, . presumptions arising u/s 114, which is a general section, if they come into conflict with presumptions arising from provisions which can be called special provisions then presumptions arising under the general provisions must yield place to the presumptions arising under the special provisions.

5. This takes us to Section 107 of the Evidence Act which says that:

"Where the question is whether a man is alive or dead, and it is shown that he was alive within 30 years, the burden of proving that he is dead is on the person who affirms it."

In other words Section 107 raises a presumption that a person is alive if it is proved that he had been alive within 30 years from the date when the question of his death is put into issue. In the instant case admittedly Irappa was alive within 30 years from the date of the adoption. Hence the plaintiff cannot get any assistance from the presumptions flowing from Section 114 of the Evidence Act

6. This leads us on to Section 108 of the Evidence Act which reads:

"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 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Section 108 is an exception to Section 107. If a case comes within the four corners of Section 108 it is taken out of the purview of Section 107. The present case undoubtedly comes within the scope of Section 108. But then the question arises as to what is the scope of the presumption arising from Section 108. On this point there is serious cleavage of judicial opinion. All courts are agreed that the presumption available from Section 108 is only of assistance for the purposes of proving the factum of death and not the time or the date of death. If time or date of death becomes material in any particular case, that fact will have to be proved as any other fact, no assistance being available from Section 108. Some Courts have taken the view that though Section 108 is of no assistance in establishing whether the death in question has taken place at any time between the period of 7 years mentioned in Section 108 or at the end of that period, the assistance of that section can be availed of to prove that the person concerned was dead at the end of that period, though the date and time of his death remains unestablished. But some other Courts have taken the view that on the basis of the presumption arising from that section all that the Court can hold is that the concerned person was dead on the date of the suit. If the latter view is the correct view of the law, then the plaintiff must necessarily be out of Court because that presumption is of no assistance to him to prove that Irappa was dead prior to 1955. This latter view had commended itself to the first appellate Court and that was the reason for dismissing the suit. We have now to see whether that view is correct.

7. The language of Section 108 does not lend any assistance for the view taken by the first appellate Court. That section nowhere says that the presumption would be that the person concerned was dead on the date of the suit. Section 108 merely deals with the procedure to be followed, when a question is raised before a Court as to whether a person is alive or dead. That section does not lay down any presumption, as to how long the person concerned must be deemed

to . have been alive or at what time he died. See *Band Veeramma v. Gangala Chinna Reddi*, AIR 1914 Mad 505. In my opinion the relevant point of time at which the presumption u/s 108 is available is when the factum of the death of the person concerned becomes material. In the present case the question whether Irappa was alive or dead became material in 1955. If Irappa had not been heard of by persons who should have heard of him if he was alive for 7 years prior to 15-8-1955 then the presumption would be that he was dead on or before 15-8-1955.

8. It may be remembered that Section 108 of the Evidence Act has its origin in the English law. The law in England was authoritatively laid down in *Re. phene's Trust* (1870) 5 Ch A 139. In that decision it was observed :

"If a person has not been heard of for 7 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 7 years lies upon the person who claims a right to the establishment of which that fact is essential."

The law in England on this point is set out in *Halsbury's Laws of England* (Simonds' Edition) Vol. 15 at paragraphs 623 and 624. In paragraph 623 it is stated :

"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." In. paragraph 624 we find the following statement:

"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 view expressed in *Halsbury's Laws of England* has been reiterated in *Chipchase v. Chipchase* 1939 3 All ER 895 and in *Watkins v. Watkins*, 1953 2 All ER 1113. Though these decisions relate to matrimonial cases, the Judges in those cases did not proceed on the basis of any special rules of evidence relating to matrimonial cases. They proceeded on the basis of the general law of evidence as laid down in 1870 5 Ch A 139. If the English decisions are of any assistance in finding out the true meaning of Section 108, there can be no doubt that the material date for finding out the factum of death of Irappa is 1955 and not the date of the suit.

9. If we accept the contention of Sri Mahajan, the learned counsel for the respondent that the relevant date is the date of the suit that would lead to

considerable difficulties, if that should be held to be the true view of the law, then there can be no question of any valid adoption by a lady whose husband's whereabouts are not known for years together, even though he was not heard of for more than 7 years. The difficulty would be all the more in the case of second marriages. If the husband or wife is not heard of for more than seven years by those who should have heard of him or her, he or she could not marry again because the law would only presume that that person is dead on the date of the suit. Further, the view canvassed by Sri Mahajan would lead to considerable difficulties in the case of inheritance, survivorship and joint family management. As mentioned earlier there is no justification for cutting down the scope of Section 108 on the basis of the language of the section. Further the public interest will not be advanced by accepting the view contended by Sri Mahajan. In the final analysis justification for any law is the advancement of public interest. Whatever the canon of interpretation I may apply, I find no justification for the view pressed on us by Sri Mahajan.

10. It is true that Sri Mahajan's contention is amply supported by several decided cases. We shall now proceed to consider them.

11. As early as 1911 a Full Bench of the Allahabad High Court in Muhammad Sherif v. Bande Ali ILR 34 All 36 upheld the view taken by Mookerjee, J. in Srinath Das v. Probodh Chunder Das 11 Cal LJ 580 to the effect that the only presumption which is enacted by Section 100 of the Indian Evidence, Act, is that the party is dead at the time of the suit, but there is no presumption as to the precise time of his death. Quite naturally this view of the Full Bench was followed by a later Bench of the Allahabad High Court in Rekhab Das Vs. Musammatt Sheobai and Another, .

12. The view taken by the Allahabad High Court found its echo in the decision of the Bombay High Court in Jeshankar Revashankar v. Bai Divali AIR 1920 Bom 85 (2) wherein Macleod Chief Justice and Heaton J. accepted the view of the law as propounded by the Allahabad High Court.

13. In 1921 the Madras High Court struck a different note in Bal Naicken Vs. Achama Naicken, , wherein their Lordships Oldfield and Ramesam, JJ. held:

"in a case where the point of time to which the death has to be referred, may be placed in differently either wherein the seven years or after the lapse of the seven years (it not being necessary to show that the person. lived during the seven years), there is a presumption after the lapse of the 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".

(As summarised in the head note).

I am in respectful agreement with the view taken by their Lordships in the said case.

14. Then came the decision of the Privy Council in *Lal Chand v. Ramrup Gir* AIR 1926 PC 9. This decision instead of ending the controversy that was existing became the starting point of another controversy. The Courts are divided as to the true effect of that decision. But, to my mind there appears to be room for that controversy. Dealing with Sections 107 and 108 of the Evidence Act, this is what their Lordships observed (at page 11)

"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 *Range Balaji v. Mudiyeppa* ILR 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 1870 5 Ch A 139 run 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 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".

15. From that decision it is clear that their Lordships approved the ratio of the decision in 1870 5 Ch A 139 which merely laid down that there is no presumption that the person concerned died within the period of seven years during which he was not heard of. Their Lordships of the Judicial Committee added one more qualification i. e., that there is no presumption that he died at the end of the period. In other words a presumption arises at the end of the period of seven years mentioned above that he is dead, the question when he died remaining unanswered by the application of Section 108.

16. The scope of the decision of the Privy Council in AIR 1926 PC 9 came up for consideration before a Full Bench of the Lahore High Court in *Punjab v. Natha* AIR 1931 Lah 582 (FB). The Full Bench opined that the decision of the Privy Council is an authority for the proposition that where a person has not been heard of for seven years, and a suit is instituted, Section 108 of the Evidence Act raises a presumption that on the date of the suit the person concerned was dead, there being no presumption as to the date of his death. With great respect to the

learned Judges who decided that case, I am unable to accept that decision as laying down the law correctly. I have not been able to find a single passage in the decision of the Privy Council supporting the view that the presumption is that the person concerned is dead on the date of the suit. The Judicial Commissioner of Peshawar took the same view as taken by the Full Bench of the Lahore High Court in *Wali Mohd. v. Gaman* AIR 1944 Pesh 29. For the very reason that I am unable to follow the decision of the Lahore High Court referred to above, I am also un-able to follow the decision of the Judicial Commissioner of Peshawar in AIR 1944 Pesh 29. The Travancore-Cochin High Court followed the decision in AIR 1944 Pesh 29 in *Ramabai v. Saraswathi* AIR 1953 Trav Co. 114. I need hardly say that I am not convinced about the correctness of that decision.

17. The point that is debated before us came up for consideration before a Bench of the Andhra Pradesh High Court consisting of Subba Rao, C. J. (as he then was) and Satyanarayana Raju, J. in *Venkateswaralu v. Bapayya*, AIR 1957 A.P. 380. After an exhaustive examination of the decided cases, their Lordships came to the conclusion that the presumption u/s 108 of the Evidence Act extends to the fact of death at the expiration of seven years during which the person concerned was not heard of. They negatived the view that the presumption is that the person is dead on the date of the suit. I entirely agree with the view taken in this decision if I may say so with respect. This very view was taken by a single Judge of the Madras High Court in *Life Insurance Corporation of India v. Seshi Ammal* AIR 1958 Mad 463.

18. For the reasons mentioned earlier, I agree with Sri Javali, the learned counsel for the appellant that in view of Section 108 it must be presumed that Irappa was dead on the date of the adoption.

19. Before leaving this aspect I should like to mention that under the changed circumstances the continuance of Section 107 would be a source of immense troubles. We are in an age of airplane and sputniks. Death in unknown places and under unidentifiable circumstances is a matter of every day occurrence. That being so, Section 107 would work to the detriment of the heirs of the deceased. Hence it might be advisable to delete that provision.

20. For the reasons mentioned above, I allow this appeal, set aside the decree and judgment of the first appellate Court and restore that of the trial Court.

21. In view of the serious conflict of the judicial opinion noticed earlier, I think it will be proper to direct the parties to bear their own costs both in this Court and in the first appellate Court. The defendant shall pay costs of the plaintiff in the trial Court.