
(2005) 07 CAL CK 0019
In the Calcutta High Court
Case No : F.M.A. No. 325 of 2005

Sudarshan Shaw

APPELLANT

Vs

Subhas Shaw

RESPONDENT

Date of Decision : 06-07-2005

Acts Referred:

Evidence Act, 1872 — Section 108
Penal Code, 1860 (IPC) — Section 198
Succession Act, 1925 — Section 276, 293, 298, 370, 372

Citation : (2005) 3 CHN 456 : (2005) 2 ILR (Cal) 231

Hon'ble Judges : Joytosh Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Tapas Kumar Manna, for the Appellant; Jayanta Kumar Mondal and S.P. Roy Chowdhury, Amicus curiae, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of an applicant u/s 372 of the Indian Succession Act, 1925 (hereinafter referred to as "the Act") and is directed against Order No. 22 dated 4th November, 2003 passed by the learned Chief Judge, City Civil Court at Calcutta in Act 39 Case No. 103 of 2000 thereby holding that in the absence of death certificate of the deceased the proceedings u/s 372 of the Act was not maintainable unless the applicant gets a declaration as to the death of deceased by filing separate proceedings in a Civil Court.

2. The appellant herein filed the aforesaid proceedings u/s 372 of the Act for grant of Succession Certificate for the purpose of receiving the debts and security of one Subhas Shaw, his father, who was last seen on 2nd May, 1993 and was missing from his place of residence at 37D/2, Hari Ghosh Street, Calcutta - 6 from that day.

3. In the said application, it was alleged that from 2nd May, 1993 the said Subhas Shaw was not traceable, as a result, the applicant made general diary in the Burtolla Police Station on 24th May, 1993 and also gave information to the Calcutta Doordarshan Kendra, Golfgreen for telecasting the missing information

and published the fact of missing with photographs under the heading "Jankari Chahia" in "Sanmarg", a Hindi Daily Newspaper on 3rd August, 1993, but till the date of filing of the application, nobody could give any information about the said person. In the meantime, seven years have passed and as such, it should be presumed that the said Subhas Shaw died on or about 2nd May, 1993.

4. At the time of hearing of such proceedings, the applicant himself gave evidence in support of the statements made in the application and further stated that the D.C.D.D., Lalbazar vide memo dated 23rd October, 2000 informed the wife of the missing person that all efforts to trace out the missing subject proved futile and the chance of tracing him out seemed to be very remote. The wife of the said Subhas Shaw also gave evidence in support of the application and no persons came forward opposing the application or contending that the whereabouts of the said Subhas Shaw was known to any person after the month of May, 1993.

5. The learned Chief Judge by the order impugned herein has rejected the application on the ground that as there is no Death Certificate or any certificate showing conclusive proof of death of the missing person, the application was not maintainable inasmuch as the requirements of the provisions of grant of Succession Certificate as provided in the Act had not been complied with.

6. Being dissatisfied, the applicant has come up with the present appeal.

7. The wife and other children of the said Subhas Shaw have supported the claim of the appellant.

8. Mr. Manna, the learned advocate appearing on behalf of the appellant contended before us that if a person is not traceable for more than seven years, it is the duty of the Court to apply the principles laid down in Section 108 of the Evidence Act and after declaring the missing person to be dead, to grant the Succession Certificate in favour of the applicant if other requirements of the relevant Statute are complied with.

9. Since the respondents were supporting the appellants and the point involved in this application is a very important one having far-reaching consequences not only in the matter of grant of Succession Certificate but also in the matter of grant of probate and letters of administration provided under the Act, we requested Mr. S. P. Roy Chowdhury, the learned senior advocate to assist this Court as *amicus curiae* for the purpose of disposal of this appeal. Mr. Roy Chowdhury notwithstanding his brisk professional engagements agreed and has made submissions supporting the appellant.

10. Mr. Roy Chowdhury submits that u/s 372 of the Act although disclosure of time of death of the deceased is one of the requirements, such provision is not mandatory but a directory one. According to Mr. Roy Chowdhury although presumption u/s 108 of the Evidence Act is only a presumption of death and there is no presumption of date of death, a Court dealing with the application

under the Act is entitled to arrive at a conclusion as to the approximate date of death of the deceased on the basis of evidence adduced by the parties. If it appears to the Court from the evidence on record, Mr. Roy Chowdhury proceeds, that the person is really not traceable for the last seven years or more, it can come to a finding that on the date of presentation of the application, the person concerned was really dead and in that case, there will be no impediment in granting Succession Certificates in accordance with law. Mr. Roy Chowdhury by pointing out the recent decisions of the Supreme Court in the cases of 1) L.I.C. of India Vs. Anuradha, , 2) Darshan Singh and Others Vs. Gujjar Singh (Dead) by Lrs. and Others, and 3) N. Jayalakshmi Ammal and another Vs. R. Gopala Pathar and another, submits that those decisions do not stand in the way of the Court dealing with an application under the Act to pass necessary order if it appears from the evidence on record by applying the principle of preponderance of probability that the person concerned was really dead on the date of presentation of the application. He, thus, supports the contentions of the learned advocate for the appellant.

11. Therefore, the sole question that arises for determination in this appeal is whether a Court dealing with the proceedings u/s 372 of the Act can entertain an application and grant relief to the applicant even though the applicant is unable to specify the exact time of death of the person concerned in his application. Before dealing with such question, we propose to refer to the provisions contained in Section 372 of the Act which are- quoted below :

"372. Application for certificate.--(1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely:

- (a) the time of the death of the deceased;
- (b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits;
- (c) the family or other near relatives of the deceased and their respective residences;
- (d) the right in which the petitioner claims;
- (e) the absence of any impediment u/s 370 or under any other provision of this Act or any other enactment to the grant of the certificate or to the validity thereof if it were granted; and
- (f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed

to have committed an offence u/s 198 of the Indian Penal Code.

(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof."

12. At this juncture, it may not be out of place to mention here that even for the grant of probate under the Act similar requirements are contemplated u/s 276 of the Act and an applicant for the grant of letters of administration is also required to comply with those requirements.

13. After hearing the learned Counsel appearing in the matter and after going through the entire scheme of the Act we find that for the purpose of grant of probate, letters of administration or Succession Certificate the statute has cast a duty upon the applicant to mention the "time of death of the deceased" and one of the objects behind such provision is, in our opinion, to ascertain whether the Court before which such application is filed has the territorial jurisdiction to entertain the application. The territorial jurisdiction of the Court to entertain those applications depends upon the fact whether the deceased had "at the time of his death" a fixed place of abode or residence within the local limit of the jurisdiction of the Judge before whom the application is made. The other object of demanding the aforesaid information is to ascertain who the legal heirs of the deceased would be in case of his intestate succession so that before granting relief under the provision of the Act, the Court can issue notice upon those persons for the purpose of satisfying itself whether those natural heirs have any objection in the matter of granting relief under the Act in favour of the applicant. Apart from the aforesaid two reasons, although for the purpose of grant of Succession Certificate there is no other impediment, yet, for grant of probate and letters of administration, the Court is further required to be satisfied that seven clear days have expired after the death before grant of probate and fourteen clear days, for grant of letters of administration as provided in Section 298 of the Act.

14. Apart from those reasons, we have at least not found out any other cause for compelling the applicant to disclose "the time of death of the deceased" in the application for grant.

15. Therefore, the most vital question is whether an applicant is required to give the precise time of death of the deceased in his application.

16. The Act was passed in the year 1925 when throughout India the municipal laws were not so much stringent like the ones existing in the present days making registration of death compulsory. In remote villages there was not even any practice of issue of any Death Certificate by any doctor in view of insufficient number of registered medical practitioner nor was cremation of dead body proscribed without the production of such medical certificate in those days. Notwithstanding such state of affairs prevailing at that time in the country, the aforesaid provision was incorporated in the Act. In our view, if exact time of death is compulsorily required to be mentioned in the application for the grant, it

would not be possible in many cases to file application under the Act for the applicant might not be in a position to take the responsibility of making statement before Court specifying the exact time of death occurred sixty years ago though the executor was prepared to avow that the testator was dead. We feel that the reasonable interpretation of Clause (a) of Section 372 will be that the mention of approximate time of death in the application will be sufficient compliance of the provisions; but in such a case, it will be the duty of the applicant to convince the Court at the time of hearing that the person concerned had definitely died at the time of presentation of the application and for the purpose of proving such fact, the applicant is required to give oral or documentary evidence and Court is required to arrive at the conclusion as to the death and approximate time of death on the basis of either specific or circumstantial evidence so that the Court can also come to the conclusion that it has territorial jurisdiction to entertain the application by ascertaining whether at that time, the deceased had a permanent place of residence in the locality.

17. Therefore, if an applicant in his application merely states that the person concerned is not traceable for more than seven years before the date of presentation of the application, such application cannot be rejected on the simple ground that no precise date of death has been given nor is the applicant required to produce documentary evidence in support of the statement made in the application.

18. According to the provision contained in Section 108 of the Evidence Act, if before any Court a question arises as to whether a person is dead or alive, the Court can legitimately draw the inference mentioned in that section if it is proved that he has not been heard of for seven years by those who would have naturally heard of him if he had been alive. In the case before us, the applicant has given evidence showing that nobody has heard about the person concerned after 1993 and the application was filed beyond seven years from the date when the missing person was last seen by the persons who would in the normal circumstances hear about him. If somebody disputes such fact and gives evidence that he has seen him within the period of seven years, in such a case, the Court dealing with the application is required to assess evidence of both the parties and arrive at a conclusion. If the assertion of an objector that the person concerned is alive or that his whereabouts was known within seven years is believed, the Court will dismiss such application; on the other hand, if on consideration of the materials on record the Court is of the view that claim of the applicant is correct and that, the person concerned was really not heard for the last seven years from the date of presentation of the application, the Court can grant relief to the applicant provided other requirements of the statute are satisfied. In a given case, for the purpose of ascertaining who the natural heirs of the deceased are, the date of death may be a vital factor. In such a case, the Court will insist upon notice of the application upon all those persons who might become natural heirs of the deceased if the death occurred at any particular time or times during the period of the said seven years and after hearing those persons, the Court will come to

the conclusion whether deceased was really dead. We are quite conscious of the decisions of the Supreme Court mentioned above where Supreme Court in clear terms held that presumption mentioned in Section 108 is only the presumption of death and on the basis of that presumption, a Court cannot grant relief to a litigant if such person is required to prove exact date of death. Those cases, however, did not arise out of the proceedings under the Act we are concerned. Nevertheless, those decisions of the Apex Court virtually approve the proposition of law that a Court is entitled to come to a conclusion as to the time of death of a person or approximate time thereof on the basis of evidence placed before it even without relying upon the presumption u/s 108 of the Evidence Act and it is needless to mention that law does not require that such evidence must necessarily be documentary evidence.

19. In a case under the Act, all that the applicant is required to prove is that the person concerned was dead at the time of presentation of the application. Once some evidence is given and it is further established that at the relevant time the applicant had a fixed place of abode within the territorial jurisdiction of the Court, there is no bar in entertaining the application even if actual date of death is not available. In case of probate and letters of administration, all that is required u/s 293 of the Act is that those should be granted after the expiry of specific days from the date of death as mentioned therein and the Court can after finding that the person is dead, wait for such period and grant the probate or letters of administration after the expiry of those periods even if the Court is unable to come to the conclusion that as to any specific date of death.

20. It is now settled law that if the exercise of jurisdiction of a Court depends upon existence of some jurisdictional fact and any dispute is raised as to the subsistence of such fact, the Court itself is entitled to decide such fact after taking evidence. (See *Smt. Ujjam Bai Vs. State of Uttar Pradesh*,). For instance, if in an application for grant of probate, the executor has mentioned a definite date of death of the testator and in such proceedings, the caveator takes specific plea that the testator is still alive and that the certificate of death produced by the executor is a fictitious one, the Probate Court is entitled to take evidence and decide whether the testator is really dead; because a Probate Court cannot declare the Will in question to be the last Will of the testator unless it is established that the testator is dead and consequently, there is no possibility of revoking such Will. Similarly, on evidence if it is proved that the date of death furnished by the executor is a wrong one but the testator had definitely died either before or after that specific date but before filing of the application for grant of probate, the Court cannot reject the application simply on the ground that the date of death mentioned in the application was found to be wrong. Thus, non-furnishing of the exact date of death is not fatal to the application if ultimately it is established by evidence that the person concerned was really dead at the time of filing of the application. The same principle applies to the proceedings for grant of Succession Certificates.

21. We, thus, find that the learned Chief Judge, City Civil Court refused to exercise jurisdiction vested in him by law by holding that in the absence of Death Certificate or other certificates it was not possible for him to grant the relief claimed. The law does not require that the fact that a person is dead must be proved only by documentary evidence. In a civil litigation finding on all disputed question of facts including the time of death can be arrived at from the evidence on record by applying the principle of preponderance of probability. Similarly, in the proceedings under the Act, the Court will on the basis of evidence adduced by the parties come to the conclusion whether the person concerned was really dead and whether such person had a fixed place of residence within the territorial jurisdiction of the Court at the time of his death and whether all the persons, who could be his natural heirs in case of intestate succession, have been served or not. The Court can, in a doubtful case, as a matter of precaution, direct publication of the notice of the proceedings in newspapers so that if there is remote possibility of any person of getting the right of inheritance, he can come and oppose the grant.

22. At this stage, it may not be out of place to mention that if the concerned person was really alive or that the grant was obtained on the basis of wrong statement supplied by the applicant, the Act itself makes provision for revocation of grant on that ground and in those grounds mentioned for revocation, the statute has specifically indicated that even if for ignorance of fact without any fraudulent intention, the applicant gave wrong particulars, such fact will be a ground of revocation.

23. We, therefore, hold that in an application for grant of Succession Certificate or probate or letters of administration there is no necessity of giving the precise date of death of the concerned person nor is there any requirement of adducing documentary evidence alone in support of such fact and the same can be proved by oral or even circumstantial evidence. There is even no necessity of filing a separate civil suit for declaration that the missing person is dead before filing of an application under the Act because it is within the province of the Court dealing with the application to give such declaration. The Court while considering an application under the Act is required to come to the conclusion on the basis of evidence on records whether the missing person was dead on the date of presentation of the application in order to exercise jurisdiction under the Act.

24. We, accordingly, set aside the order impugned and direct the learned Trial Judge to hear out the application on merit after giving a direction upon the applicant to disclose whether the mother of the missing person was alive on the date he was last seen. If it appears that his mother had died after that day, the Court will direct issue of notice also upon the other heirs, if any, of the mother of the missing person so that they may get opportunity to prove that the person concerned died before the death of his mother and in such case, those persons will also be entitled to a share of the assets of the missing persons through their mother and the Court is bound to hear their objections, if any, against the claim

of the applicant. Since the proceedings are pending for the last five years, the learned Chief Judge, City Civil Court is directed to dispose of the proceedings positively within three months from the date of communication of this order. In the facts and circumstances, there will be, however, no order as to costs.

25. We record our appreciation of the submission made by Mr. Roy Chowdhury which has helped us to come to the conclusion.

Joytosh Banerjee, J.

I agree.