
(2012) 07 KL CK 0106
In the High Court Of Kerala
Case No : C.R.P. No. 104 of 2005

Tangerine, A.K. and Others

APPELLANT

Vs

M/s. Vantage Marketing and Others

RESPONDENT

Date of Decision : 25-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 9 Rule 13, 46
Evidence Act, 1872 — Section 107, 108
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2012) 3 ILR (Ker) 976 : (2012) 3 KLJ 532

Hon'ble Judges : V. Chitambaresh, J

Bench : Single Bench

Advocate : K.S. Babu, Smt. N. Sudha and Sri. A.S. Thomas Smith, for the Appellant; K. Lakshminarayanan, Sri. N.L. Krishnamoorthy and Sri. T. Madhu, for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice V. Chitambaresh

1. A desperate bid by the wife and children of a "missing" man to salvage their residential house from being proceeded against in execution of a decree for money. The allegation is that the defendant was an employee of the plaintiff firm and had misappropriated money while in service. The suit was filed for realisation of a sum of Rs. 1,60,980 with interest on the further allegation that the cheque later issued by the defendant was dishonoured. Crime No. 263/1997 on the file of the Kasaba Police Station was registered for the alleged defalcation of money. It is conceded that the defendant who is the accused in the case is absconding and the criminal case remains long pending. The defendant reportedly did not return home from office on 16-9-1997 and the search for the missing person by his friends and relatives did not yield any result.

2. The whereabouts of the defendant had not been known since 16-9-1997 according to his wife and children who are the revision petitioners herein. It was

their specific case that two complaints were given to the police on 17-9-1997 and on 7-9-1999 about the defendant missing. The defendant could not therefore enter appearance in the suit either personally or through counsel. An ex parte decree for realisation of money was eventually passed against the defendant on 23-3-2001 which was put into execution.

3. The wife and children waited for seven long years to call in aid the provisions of Sections 107 and 108 of the Indian Evidence Act, 1872 (the "Act" for short). A presumption as regards the civil death of the defendant could be drawn as his wife and children had not heard from him. The period of seven years expired on 15-9-2004 and applications were filed in the suit on 14-10-2004. LA. No. 4192/2004 was filed for the purpose of impleading and LA. No. 4193/2004 was filed to set aside the ex parte decree. Both the applications were dismissed by a common order and are the subject-matter of C.R.P. Nos. 188/2004 and 517/2008. The latter case had been filed as a civil miscellaneous appeal in the lower appellate court and withdrawn to this Court for disposal.

4. The house of the defendant had in the meanwhile been attached in execution and brought to sale which was bid in auction by a stranger purchaser. E.A. No. 284/2004 in E.P. No. 398/2002 filed to set aside the sale was dismissed and affirmed in appeal by the lower Appellate Court. The same is also challenged in C.R.P. No. 104/2005 by the wife and children of the defendant. The auction sale had however not been confirmed or delivery effected in view of the interim orders in the Civil Revision Petitions.

5. I heard Ms. N. Sudha, Advocate on behalf of the revision petitioners, Mr. K. Lakshminarayanan, Advocate on behalf of the decree-holder and Mr. T. Madhu, Advocate on behalf of the auction purchaser.

6. Sections 107 and 108 of the Act read as follows:

107. Burden of proving death of person known to have been alive within thirty years.--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. Burden of proving that person is alive who has not been heard of for seven years.--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 he is alive is shifted to the person who affirms it.

The wife and children of the defendant could not have moved the court below earlier since the period of seven years after the defendant was found missing expired on 15-9-2004 only. The application for impleading under Order XXII, Rule 4 of the Code of Civil Procedure, 1908 (CPC for short) was filed on 14-10-2004 itself. Similarly the application to set aside the ex parte decree u/s 46 read with Order IX, Rule 13 of the CPC was also filed on 14-10-2004. The

applications were filed well within one month after the expiry of the period of seven years from the date of missing. The court below therefore erred in dismissing the applications for impleading and to set aside the ex parte decree as belated.

7. I am fortified in this view by the judgment of the Supreme Court in L.I.C. of India Vs. Anuradha, wherein it is held as follows:

In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two Sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have normally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years, the presumption raised u/s 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised u/s 108 is a limited presumption confined only to presuming the factum of death of the person whose life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of six years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead.

(emphasis supplied)

8. The plaintiff firm contended that service of notice was effected in the suit at the residential address of the defendant and that the same was proper. But Order IX, Rule 13 of the CPC envisages also a situation where the defendant was prevented by sufficient cause from appearing in the suit. The defendant being missing could not make arrangements for his appearance and was thus prevented by sufficient cause. This is a fit case where the ex parte decree for money should be set aside since sufficient cause had been well-established.

9. The burden shifts to the plaintiff firm to show that the defendant was alive when his wife and children asserted that they had not heard from him for seven years. This is the purport and import of Section 108 of the Act as has been judicially explained. The mere fact that some other person had also filed a suit and obtained an ex parte decree against the defendant was not sufficient to

discharge the burden. The court below was bound to draw presumption as regards the civil death of the defendant under the circumstances.

10. It is of course true that the interest of a stranger auction purchaser would be protected despite the fact that the underlying decree is set aside. The following are the oft quoted decisions:

- (i) Janatha Textiles and Others Vs. Tax Recovery Officer and Another,
- (ii) Ashwin S. Mehta and Another Vs. Custodian and Others,
- (iii) Gurjoginder Singh Vs. Jaswant Kaur (Smt) and Another,
- (iv) Padanathil Rugmini Amma Vs. P.K. Abdulla,
- (v) Janak Raj Vs. Gurdial Singh and Another,

But the auction sale in the instant case had not been confirmed and added to this is the fact that the auction purchaser himself does not want the property. The auction purchaser has filed LA. No. 2842/2011 in CRP No. 104/2005 seeking permission to withdraw the amount deposited by him. The auction purchaser is keen to get back the amount as he is facing two prosecutions u/s 138 of the Negotiable Instruments Act. There is therefore no impediment for setting aside the sale also while setting aside the ex parte decree for money. I do so notwithstanding the stiff opposition of the decree-holder that the auction purchaser should not be allowed to wriggle out of the sale.

Resultantly all the three Civil Revision Petitions are allowed. The ex parte decree is set aside and O.S. No. 291/2000 on the file of the court of the Subordinate Judge of Kozhikode is resurrected to file. The wife and children of the defendant (presumed to be dead) are brought on record as supplemental defendants in the suit. The court below is directed to dispose of the suit on merits expeditiously within a period of six months from today. The auction sale conducted in execution of the ex parte decree is also set aside in view of the unequivocal stand of the auction purchaser. The amount deposited by the auction purchaser shall be released to him by the court below as and when an application for cheque is put in. The wife and children of the defendant however undertakes not to create any encumbrance over the property till the suit is disposed of.

The impugned orders are set aside and the Civil Revision Petitions are allowed. No costs.