

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.5362 of 2015

ORDER:

This revision under Article 227 of the Constitution of India by the unsuccessful proposed defendants 13 to 16 is directed against the order dated 07.10.2015 of the learned Junior Civil Judge, Alair passed in I.A.No.375 of 2015 in O.S.no.312 of 2013 filed by the said proposed defendants under Order I Rule 10 (2) read with Section 151 of the Code of Civil Procedure, 1908 and section 108 of the Indian Evidence Act.

2. I have heard the submissions of the learned counsel for the revision petitioners/proposed defendant ('the proposed defendants', for brevity) and the learned counsel for the respondents 4 to 7/defendants 3 to 6 ('the defendants 3 to 6', for brevity). Notice sent to the 1st respondent/plaintiff returned unserved with the endorsement 'Addressee left without instruction'. It is deemed that the 1st respondent is served with the notice. None appears. I have perused the material record.

3. The facts to be stated as a prelude to this order, in brief, are as follows:

The plaintiff brought the suit for partition against the sole/1st defendant, his brother. The 2nd defendant at his instance was impleaded as per orders in IA no. 508 of 2006. On the death of the 1st defendant, his legal representatives are impleaded as defendants 3 to 6 as per orders in IA no. 665 of 2010. The defendants 7 to 12, who are also impleaded as per orders in IA no. 417 of 2014 had remained *ex parte* in the suit. The 2nd defendant having filed his written statement did not appear before the Court below and had failed to adduce any evidence.

3.1 When the suit is at the stage of hearing arguments, the present proposed defendants, who are the legal heirs or legal representatives of the

2nd defendant, had filed the aforementioned petition for permission for their impleadment as party defendants 13 to 16 on the following grounds: 'The proposed defendants are the wife and sons of the 2nd defendant. The 2nd defendant had filed a written statement resisting the suit. Due to financial problems, the 2nd defendant had left the house in month of March 2008, without any intimation. The proposed defendants searched the houses of relatives and friends. All their efforts to trace out the 2nd defendant had proved in vain. Though a report was lodged with the police concerned, no action was taken. No communication was received from the 2nd defendant and he did not visit the house of the proposed defendants. During his stay with the proposed defendants, he had informed about the instant suit. When these defendants had approached the counsel engaged by the 2nd defendant, they were advised to adduce evidence in the suit. Then they had informed the counsel in regard to the disappearance of the 2nd defendant and his whereabouts being not known since March 2008 and absence of any communication from him. When a person disappears from the residence and is not heard of for 7 years, it can be presumed that such person is dead. In the circumstances the proposed defendants have to protect their legitimate rights and their share in the suit schedule property by contesting the suit in the place of the 2nd defendant. The proposed defendants are, hence, necessary parties and are to be impleaded as defendants 13 to 16 in the place of the 2nd defendant. If the proposed defendants are not permitted to be impleaded, they will lose valuable rights in respect of their share in the property and would be put to irreparable loss and injury which cannot be compensated.'

3.2 The plaintiff filed Counter stating as under: 'The 2nd defendant got himself impleaded in the suit by claiming that the suit property is the joint family property and that he is a legal heir of Buchi Mallaiah though he is not a legal heir of the said Mallaiah. The material allegations made in support of the request in the petition are false. The proposed defendants and the 2nd

defendant are residents of the same house and as such the question of the 2nd defendant's disappearance does not arise. No document is produced to show that a police complaint was lodged. The 2nd defendant is not the legal heir of Buchi Mallaiah, who is the father of the plaintiff and the 1st defendant. The petition is filed with a false story to drag on the matter.

3.3 The defendants 3 to 6 also resisted the application by stating that the 2nd defendant had not at all disappeared and that the plea that his whereabouts are not known is not correct and that the proposed defendants had not filed any legal heir certificate and that they are not the legal heirs of the 2nd defendant and hence, the petition is liable for dismissal.

3.4 On merits the trial Court had dismissed the application of the proposed defendants. The trial Court, having adverted to the provision of section 108 of the Indian Evidence Act and having noted that the proposed defendants did not file the copy of the police report, if any, given and also any document to prove that they are the legal heirs of the 2nd defendant, had held that their contentions cannot be believed on mere assertions and in the absence of any documentary proof. Having been aggrieved of the said orders, the proposed defendants had filed this revision.

4. The learned Counsel for both the sides made submissions in line with the pleaded cases of the respective parties.

4.1 The learned counsel for the proposed defendants further contended as follows:

The said defendants are not well versed with legal formalities. Hence, they did not retain a copy of the police report and did not take any steps in spite of police inaction in the matter. The plaintiff, in fact, did not dispute their relationship with the 2nd defendant; on the other hand it is contended by the plaintiff that the 2nd defendant resided in the same house with the proposed defendants. Since the proposed defendants or any person of the village has not seen the 2nd defendant since March 2008 and as his

whereabouts are not known and as he has not been heard of for more than seven years by either the parties to the suit or any person who would have naturally heard of him, if he had been alive, the onus of proof is discharged. Therefore, the trial Court ought to have permitted the proposed defendants to be impleaded as party defendants 13 to 16 to the suit in the interests of justice.

4.2 On the other hand the learned counsel appearing for the contesting defendants while supporting the orders of the Court below would submit that unless it is proved that the whereabouts of the 2nd defendant are not known for more than seven years, the proposed defendants cannot be permitted to be impleaded and that in the case on hand they could not prove that the 2nd defendant had disappeared and his whereabouts are not known since seven years and hence, the Court below had rightly dismissed the petition of the proposed defendants. He would also contend that the contentions of the proposed defendants based on Section 108 of the Indian Evidence Act cannot be accepted unless a declaration is obtained by the proposed defendants from a Civil Court that the 2nd defendant is dead and/or deemed to have been dead for all intents and purposes.

4.3 In support of the above last stated contention, he had placed reliance on the decision in **K. Lakshmi v. APSRTC** [2014 (3) ALT 661].

5. I have bestowed my attention to the facts and I have given earnest consideration to the submissions of the counsel. The case of the proposed defendants is as under: "The 2nd defendant, who was impleaded as a party defendant at his instance, had filed a written statement resisting the suit. Due to financial problems, the 2nd defendant had left the house in the month of March 2008, without any intimation. The proposed defendants, who are his wife and sons, searched the houses of their relatives and friends. All their efforts to trace out the 2nd defendant had proved in vain. Though a report was lodged with the police concerned, no action was taken. No communication was received from the 2nd defendant; and, he did not later

visit the house of the proposed defendants. During his stay with the proposed defendants, he had informed about the instant suit. When these defendants had approached the counsel engaged by the 2nd defendant, they were advised to adduce evidence in the suit. Then they had informed the counsel in regard to the disappearance of the 2nd defendant and his whereabouts being not known since March 2008 and also about the absence of any communication from him.’ *Per contra*, the defence is one of denial.

The only question is as to whether, in the facts and circumstances of the case, it is allowable to draw a presumption of death and permit the proposed defendants to be impleaded as party defendants 13 to 16.

5.1 Now that the facts are stated it is necessary to refer to Sections 107 and 108 of the Indian Evidence Act. Sections [107](#) and [108](#) read as under:

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.

Section [107](#) deals with presumption of continuation of life and Section [108](#) deals with the presumption of death.

5.2 I have gone through the decision in **K. Lakshmi v. APSRTC** [supra]. The above decision was rendered in a writ petition; and, the questions that fell for consideration were in regard to death in harness of an employee, who had disappeared, and the claim of compassionate appointment. In this decision while adverting to Section 108 of the Indian Evidence Act it was held thus:

“Thus, it cannot be stated that the said provision exhaustively covers all the facets of the Common Law concept of presumed death. For instance, on completion

of seven years, as per the first limb of the provision, the initial burden is on the one who asserts that the person has not been heard for seven years to prove it to be so. On such proof, the burden shifts on to the other who asserts the person's existence. As such, Section does not deal with the aspect of when the person has exactly died or deemed to have died. It all depends on the facts of each case. In any event, the presumption comes into play only after the completion of seven years, but not before.”

The decision is more helpful to the proposed defendants. As rightly contended, the 2nd defendant who has got himself impleaded and filed a written statement would not have left the matter unattended without prosecuting his defence, had he been available; because of his disappearance only, the matter was left unattended by him appears to be more probable. There is no reason for the proposed defendants, particularly the wife of the 2nd defendant, to falsely state that the 2nd defendant had disappeared in March 2008 and that his whereabouts are not known and that he was not heard of by them or by anybody known to them and the 2nd defendant. Further, the suit is one partition and the 2nd defendant by filing his defence had claimed a share or right in the suit schedule property. Therefore, if the proposed defendants are not permitted to be impleaded and eventually if it is to be found that their present submissions are true, then complex salutation would arise at the time of execution of the decree that may ultimately be passed in the suit. Therefore, this Court is of the considered view that a *prima facie* case is made out by the proposed defendants to grant their request. Presumption under law is nothing but an inference drawn on known or proved facts. At this interlocutory stage, the facts borne out by record are sufficient to hold that the onus, which is on the proposed defendants is discharged and draw an inference as envisaged in Section 108 of the Indian Evidence Act and permit the proposed defendants to be impleaded as party defendants 13 to 16 in the interests of justice. Accordingly, this Court holds that the order impugned warrants interference and that the request of the proposed defendants deserves to be granted.

6. Viewed thus, this Court finds that the order impugned brooks

interference.

7. Accordingly, the Civil Revision Petition is allowed and the impugned order is set aside. Consequently, I.A.No.375 of 2015 in O.S.no.312 of 2013 on the file of the Court below is allowed permitting the proposed defendants to be impleaded as party defendants 13 to 16. The Court below shall first permit the amendment of the cause titles of the plaint and then further permit the plaintiff to consequently amend the plaint as per procedure and file a neat copy. It is needless to state that after such a neat copy of the plaint is filed, the Court below shall give an opportunity to the contesting defendants and the proposed defendants to file additional written statements and written statements, if they so choose and so desire.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

13th June 2016
Vjl