

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated on 02.02.2017

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No. 731 of 2007

P.Natarajan

....Appellant/Appellant/Plaintiff

Vs.

1. State of Tamilnadu rep
by District Collector,
Erode District,
Erode.
2. The Tahildar,
Taluk Office,
Perundurai Taluk,
Erode District.
3. The Superintendent of Police
Erode District Police Office,
Erode, Erode District.
4. The Inspector of Police,
Uthukuli Police Station
Uthukuli, Perundurai
Taluk, Erode District.Respondents/Respondents/Defendants

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 24.11.2004 made in A.S.No.49 of 2004 on the file of the Principal District Court, Erode confirming the judgment and decree dated 15.12.2003 made in O.S.No.138 of 2001 on the file of the District Munsif Court-cum-Judicial Magistrate, Perundurai.

For Appellant : Mr.N.Manoharan
For Respondents : No appearance.

JUDGMENT

This second appeal is directed against the concurrent findings of the Courts below, by dismissing the suit filed by the appellant herein stating that his father Ponnusamy was not heard for more than seven years and therefore to declare him presumed to a dead person as contemplated in Section 108 of

Indian Evidence Act. The plaintiff was examined as P.W.1 and one independent witness Manian was examined as P.W.2 and the paper publication was marked as Ex.A.1. The Courts below dis-believed the same and refused to grant the relief as the plaintiff not examined his mother and sister to substantiate his claim. The first appellate Court also held that the suit itself is not maintainable for the failure on the part of the plaintiff/appellant to take steps to issue notice as provided under Section 80 of C.P.C.

2. At the time of admission this Court formulated the following substantial questions of law :-

a) Whether the lower appellate Court is right in holding that the suit is not maintainable for want of notice under Section 80 C.P.C. especially when an application to dispense with notice was filed and ordered by the trial Court?

b) Whether findings of the Court below are correct in law for not drawing the legal inference under Section 108 of Evidence Act?

3. The learned counsel for the appellant submitted that the first appellate Court has failed to peruse the records properly before holding that the plaintiff has failed to issue notice under Section 80 of CPC, while the fact is otherwise. It is brought to the notice, that before the trial Court, the plaintiff has taken out an application to dispense with notice under Section 80 of C.P.C. along with the plaint and the same was ordered and the trial Court has dispensed with. Only thereafter the suit was taken out on file and proceed further.

4. I do agree with the submission made by the learned counsel for the appellant. Once notice is dispensed, later the plaintiff cannot be non-suited. When the defendant is no way pre-judiced for want of notice under Section 80 C.P.C., the finding of the lower appellate Court is erroneous. Section 108 of Indian Evidence Act speaks on the person who was not heard for more than seven years by naturally and in ordinary course of human affairs, presumed to be dead.

5. The Hon'ble Supreme Court in "Life Insurance Corporation Vs Anuradha" case reported in 2004 (2) CTC 552" has held at paragraphs 12 and 14 as under:

"12. Neither Section 108 of Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to

be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years absence and being unheard of having elapsed before that time. The presumption stands un-beutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption by of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.

14. On the basis of the above said authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. 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 naturally 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 under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who asserts 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 under Section 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 6 years and 364 days 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. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise."

6. So, it is now well settled principle of law that there can be presumption of law about the fact whether the person is alive or dead. For the said presumption the prerequisites are laid in Section 107 and 108 of Indian Evidence Act which reads 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 the 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"

7. In the case on hand, the appellant wants to prove the death of his father since he was not heard of for more than seven years. For that purpose, he has given a complaint on 12.02.1993 leading to investigation by police which resulted in reporting that he was not traceable. This fact is admitted in the written statement of the respondent. Thereafter the appellant has also taken out a paper publication dated 11.01.1994 and the same is marked as Ex.A.1. The present suit

was laid on 05.10.2001 which is after the expiry of the statutory period of seven years. Therefore this Court does not find any legal impediment for granting reliefs sought for by the appellant/plaintiff.

8. No doubt the plaintiff could have produced better evidence to enhance his case but that itself will not de-suit him since there is no contra evidence let in to show that the said Ponnusamy, who is the father of the appellant was heard and alive. In fact the presumption under Section 108 is only a rebuttable one. If any one establish the said Ponnusamy is alive, the declaration granted based on the presumption is bound to be recalled.

9. With these observations, the second appeal is allowed and the judgement and decree of the Courts below are set aside. Suit in O.S.138 of 2001 allowed. No order as to costs.

s/d-
Assistant Registrar(CS-III)

//True Copy//

Sub-Assistant Registrar

To

1. The Principal District Judge, Erode
 2. The District Munsif Court-cum-Judicial Magistrate, Perundurai
- +1 CC to M/s. N. Manokaran, Advocate sr 6801

S.A.No. 731 of 2007

GM1 (CO)
sp/24/2

सत्यमेव जयते

WEB COPY