

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.10.2020

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.14233 of 2020

Suseela

.. Petitioner

.Vs.

1. The Revenue Divisional Officer,
Krishnagiri, Krishnagiri District.

2. The Inspector of Police,
Porayar Police Station,
Nagapattinam District.

.. Respondents

* * *

Prayer : Writ Petitions filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records on the file of the first respondent pertaining to its order bearing No.x/K/2410/2020/vg; dated 24.08.2020 and to quash the same and consequently direct the first respondent to issue a death certificate of Madhesh @ Madhesan, S/o.Abbas within a stipulated period that may be fixed by this Court.

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For Petitioner : Mr.S.Sivakumar

For Respondents: Mr.R.S.Selvam
Government Advocate

O R D E R

The order of the first respondent dated 24.08.2020 made in No.x/K/2410/2020/vg; is put to challenge in this writ petition. A consequential direction to the first respondent to issue a death certificate of Madhesh @ Madhesan, S/o.Abbas - the husband of the petitioner is also sought for.

2. Heard both sides and perused the materials placed before the Court.

3. The case of the petitioner is that her husband one Madhesh @ Madhesan, who was working as Sanitary Sweeper in the Selection Grade Town Panchayat Kaveripattinam of Krishnagiri Taluk and District, went on a private tour in Nagapattinam

District. He was found missing on 21.07.2012, for which, a complaint was given by one Ravi on 27.08.2012, which was registered in Crime No.288 of 2012. As on the date of filing of this writ petition, his whereabouts is not known. The petitioner submitted a representation for family pension and compassionate appointment, based on which, she was granted family pension on 04.11.2016 with effect from 22.07.2012. On 11.11.2019, after completion of seven years from the date he went missing, the second respondent-Inspector of Police, issued a Non Traceable Certificate on 11.11.2019, based on which, she applied for death certificate on 27.01.2020 before the first respondent, which was negatived vide the order dated 24.08.2020.

4. In the counter-affidavit, the first respondent resisted the prayer and sought for dismissal of the writ petition on the ground that though as per Section 108 of the Indian Evidence Act, 1872, a person, who had not been heard for more than seven years, is presumed to be not alive, the Revenue authorities are empowered only to order the delayed deaths and births in the concerned Registers and there is no power vested on them to record the man missing cases, unless the Court decides the said issue of the Man-missing cases. It is also stated that the petitioner was advised to file a suit for declaration in the Civil Court and based the directions of the Court, the revenue authorities will act in the matter. It is also claimed that since petitioner's husband went missing in Nagapattinam District, there may arise legal issues with regard to the jurisdiction for registration.

5. There is no dispute on the factual position between the parties. Admittedly, the petitioner's husband Madhesh @ Madhesan was working as Sanitary Sweeper in the Selection Grade Town Panchayat Kaveripattinam and when he was on a private tour, allegedly, he went missing on 21.07.2012 and the complaint given in this regard on 27.08.2012 was registered in Crime No.288 of 2012 and also the second respondent issued the Non Traceable Certificate on 11.11.2019. On the strength of the said certificate, when the petitioner applied for Death Certificate of her husband, the first respondent passed the impugned order rejecting the said prayer.

6. The burden of proving that petitioner's husband is not alive is on the petitioner under Section 108 of the Indian Evidence Act, 1872.

Burden of proving that person is alive who has not been heard of for seven years.

108. 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. Section 108 of the Act enables the person, who affirms death of any one to prove that such a person has not been heard of for seven years by those who would have heard of him. However, Section 107 of the Act raises a presumption of death. The presumption that arises in Section 108 is only the death and not the date of death. The statute itself contemplates only presumption of death and not the presumption of date of death. Though the date of death of the person is not contemplated, the same can be reckoned whether from the date from which he is not heard of or from the date of expiry of seven years is still a dichotomy. Thus depending on the attending circumstances of each case, it should be open to any court to fix the date of death.

8. Under Section 108 of the Act, presumption of death is permissible only if it is proved at the time when the presumption is sought to be raised that a person concerned is not heard of for seven years by those who would have naturally heard of him, if he had been alive. Section 108 is only a procedure to be followed when the question arises before the court as to one is alive or dead. No individual like the petitioner can take advantage of and make use of the presumption under Section 108 and request the Registrar of Births and Deaths, to make an entry and issue a certificate. The Registrar of Births and Deaths can only register the actual births and deaths, based on the information given for the cause of death etc. Similarly, the Revenue officials also have no power to issue certificate of deaths.

9. A Division Bench of this court in *Managing Director vs. E.Tamilarasi* decided on 5.11.2015 in W.A(MD)No. 1101 of 2013, has clearly brought out the distinction between Sections 107 and 108 of the Indian Evidence Act, 1872. In the said judgment, in paragraphs 12 to 16, the Division Bench held as under:

12. While there can be no dispute about the presumption available under Section 108 of the Indian Evidence Act, 1872, what is important is to see the date on which such presumption arises. As per Section 108 of the Indian Evidence Act, 1872, whenever a question arises 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, burden of proving that he is alive, is shifted to the person who affirms it.

13. What is provided in Section 108 of the Indian Evidence Act, 1872, is only a presumption. Section 108 of the Indian Evidence Act, 1872 cannot

be read in isolation. It should be read along with Section 107 of the Indian Evidence Act, 1872. Under Section 107 of the Indian Evidence Act, 1872, whenever a question arises as to whether a man is alive or dead and it shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

14. Thus, Section 108 is an exception to Section 107. If Section 107 provides the rule, Section 108 provides the exception. Once it is established that a person was alive within 30 years, the burden of proving that he is dead is on the person who affirms it. This is the rule under Section 107. But, if it is proved that such a person, despite being alive within 30 years, 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 that he is alive.

15. Therefore, it follows as a corollary that for the application of Section 107, the outer limit of the period of prescription is 30 years. Similarly, for the application of Section 108, the minimum period of time limit statutorily prescribed for the presumption to arise is seven years.

16. This is why the presumption as to death cannot be raised before the expiry of seven years. It cannot be raised even if the period of seven years falls short by one or two days. In LIC of India v. Anuradha - AIR 2004 SC 2070, the Supreme Court held that the presumption as to death by reference to Section 108 would arise only on the expiry of seven years and would not by applying any logic or reasoning be permitted to be raised on the expiry of 6 years and 364 days or at any time short of it. More over, the Court pointed out that 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 the 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.

17. Therefore, the expiry of the full period of seven years is essential to raise the presumption under Section 108. This takes us to the next question

as to what exactly could be taken as the date of death.

10. Following the same, a Division Bench of the Andhra Pradesh High Court in Union of India and 3 others vs. Polimetla Mary Sarojini and Another reported in 2017 SCC Online Hyd 24 has traced the origin of the Rule in other countries and in India. In the said judgment, the Division Bench of the said court, in paragraphs 37 to 42 held as under:

37. Thus it is clear that both in England and elsewhere, the date of expiry of 7 years from the time a person went missing, is taken to be the date of death also, unless any other date is proved by the party asserting, to be the date of death. But the moment a party is able to prove a particular date as the date of death, then the question of presumption itself would not arise. The decisions of various Courts holding that in certain circumstances a person must be presumed to be dead from the date he went missing or within a few days thereafter, are based upon a flawed logic. The Evidence Act allows of only one presumption. But by holding that a person must be presumed to be dead from the time he went missing, some Courts have raised a second presumption, which is not traceable to the Evidence Act. A distinction exists between a presumed fact and an inferred one. Many times the confusion occurs due to the use of the presumption as a synonym for inference.

38. As we have pointed out earlier, there is a distinction between a presumption of fact and an inference. Section 108 of the Evidence Act admits of only one presumption namely the presumption of death of a person not heard of for 7 years by those who would normally have heard of him. Since it is a rebuttable presumption and the rebuttal can take place at any time, the law does not stipulate any date as the date on which a person may be presumed to be dead. There is huge difference between the presumption as to death and presumption as to date of death. Since the law does not prescribe any presumption as to date of death, the same may have to be proved. An inference cannot take the place of proof or presumption.

39. As a matter of fact an interesting case came up before the Succession Court in Hancock, of the State of OHIO in the U.S.A. A person by name Donald Eugene Miller went missing from August 1986, leaving his wife and two children in the lurch. His wife Robin Miller filed a petition in the Succession Court in 1994 for a declaration that her husband should be presumed to be dead. After ordering the publication of

notices in the local newspapers for 4 consecutive weeks, the Court issued a decree on 31-05-1994 declaring that Donald Eugene Miller should be presumed to be dead and that his minor children should be granted benefits under the Social Security Scheme of the Government. After 19 years of such a declaration, Donald Eugene Miller surfaced and applied for a driving licence. But the Transport Department rejected the application on the ground that no driving licence could be issued to a person who is dead as per law. Therefore, he filed a petition on 15-07-2013 in the very same Succession Court seeking to set aside the decree of the declaration of presumed death. But unfortunately his wife opposed the petition on the ground that the same was barred by limitation as it was not filed within a period of 3 years from the date of decree. The Court accepted the defence taken by the wife and dismissed the petition filed by Mr. Miller.

40. Therefore, what lies in the realm of presumption, which can be rebutted at any time, cannot be enlarged by way of interpretations, however well intended they are. Hence, we hold that the Tribunal was wrong in presuming the death of the respondents husband to have taken place from the time he went missing. Once this presumption goes, it follows as a corollary that the penalty of removal from service passed by the petitioners cannot be stated to be illegal.

GOVERNMENT ORDERS ON THE SUBJECT:

41. But the conclusion that we have come to in the preceding paragraph would not take us to our destination. Admittedly, there are executive instructions in the form of Government of India's decisions issued under Rule 54 of the CCS (Pension) Rules. Since these decisions are issued under the statutory rules, they are binding upon the Departments. One of the decisions of the Government of India could be found in Circular Letter No. 4-52/86-Pen., dated 3-3-1989. The circular reads as follows:

Payment of retirement gratuity and family pension to the family, in case an official's whereabouts are not known:-

1. A number of cases are referred to this Department for grant of family pension to the eligible family members of employees who have suddenly disappeared and whose whereabouts are not known. At present, all such cases are considered on merits in

this department. In the normal course, unless a period of 7 years has elapsed since the date of disappearance of the employee, he cannot be deemed to be dead and the retirement benefits cannot be paid to the family. This principle is based on Section 108 of the Indian Evidence Act which provides that when the question is whether the main 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.

2. The matter has been under consideration of the Government for some time as withholding of the benefits due to the family has been causing a great deal of hardship. It has been decided that (i) when an employee disappears leaving his family, the family can be paid in the first instance the amount of salary due, leave encashment due and the amount of GPF having regard to the nomination made by the employee, (ii) after the elapse of a period of one year, other benefits like retirement or death gratuity/family pension may also be granted to the family subject to the fulfilment of conditions prescribed in the succeeding paragraphs.

3. The above benefits may be sanctioned by the Administrative Ministry Department after observing the following formalities:-

(i) The family must lodge a report with the concerned Police Station and obtain a report that the employee has not been traced after all efforts had been made by the Police.

(ii) An Indemnity Bond should be taken from the nominee/dependents of the employee that all payments will be adjusted against the payments due to the employee in case he appears on the scene and makes any claim.

4. The Head of Office will assess all Government dues outstanding against the Government servant and effect their recovery in accordance with Rule 71 of CCS (Pension) Rules, 1972, and other instructions in force for effecting recovery of Government dues.

5. The family can apply to the Head of the Office of the Government servant for grant of family pension and death/retirement gratuity, after one year from the date of disappearance of the Government servant in accordance with the prescribed procedure for sanction of family pension and death/retirement gratuity. In case the disbursement of death/retirement gratuity is not effected within three months of the date of

application, the interest shall be paid at the rates applicable and responsibility for the delay fixed.

NOTE:- The above orders regulate genuine cases of disappearance under normal circumstances and not the cases in which officials disappear after committing frauds, etc. In latter type of cases, the family pension needs to be sanctioned only on the Government employee being acquired by the Court of Law or after the conclusion of the disciplinary proceedings, etc., as the case may be.

42. The above circular clinches the issue with respect to the claim of the respondent. Therefore, irrespective of our decision on the purport of Section 108 of the Evidence Act, 1872, the respondent is entitled to all the benefits as per the aforesaid decision of the Government of India under the Circular Letter No. 4-52/86-Pen., dated 3-3-1989.

11. At this juncture, it is relevant to refer to the judgment of the Hon'ble Supreme Court in LIC of India V. Anuradha, (2004) 10 SCC 131, wherein, it was held as follows :

"14. 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 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. 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."

(emphasis supplied)

12. From the decisions quoted supra, it is clear that the presumption would be raised 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. As stated above, the first respondent does not make any factual dispute and the only claim is that the said authority is not empowered to decide and declare that the petitioner's husband is alive or dead, based on the certificate issued by the second respondent, which exercise has to be undertaken before appropriate Civil Court,

where the petitioner can raise the presumption and get appropriate direction.

13. In the case on hand, the family pension is being given to the petitioner, who is the wife of the person presumed to be dead. The Pension Pay Order also specifically mentioned that the petitioner's husband died in harness.

14. In the light of the above discussions, the petitioner can get the declaration that her husband is dead only from the appropriate civil court and cannot compel the Revenue officials to issue a death certificate.

15. With the above observation, this writ petition is disposed of. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

1. The Revenue Divisional Officer,
Krishnagiri, Krishnagiri District.
2. The Inspector of Police,
Porayar Police Station,
Nagapattinam District.

+1cc to the Government Pleader, S.R.No.35195

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W.P.No.14233 of 2020

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