



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 28.07.2021

Delivered on : 20.12.2021

CORAM:

THE HONOURABLE **MRS.JUSTICE R.THARANI**

C.R.P. (MD)No.2029 of 2015

and M.P. (MD)No.2 of 2015

and

C.R.P. (MD)No.2352 of 2015

and M.P. (MD)No.3 of 2015

1.Malathi
2.Marimuthu Rajan
3.Selva Barathi Rajan ... Petitioners in both petitions
Vs.
Tharmapitchai (died)
1.Muthu Ammal
Kurusami (Died)
2.Nagamani
Pappu Ammal (died)
3.Saravanamuthu
4.Regunathan ... Respondents

Common Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decretal order, passed in E.A.No.87 of 2011, in E.P.No.18 of 2006 in O.S.No.198 of 1999, dated 16.04.2014 and passed in E.A.No.89 of 2011, in E.P.No.18 of 2006 in O.S.No.198 of 1999, dated 07.04.2014, respectively on the file of the District Munsif Court, Tiruchendur.

(In both C.R.Ps)

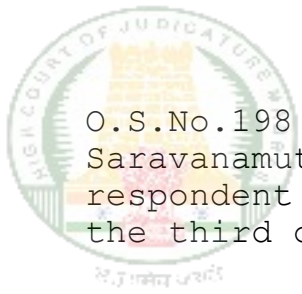
For Petitioners : Mr.H.Arumugam
For R1 and R2 : Mr.M.C.Swamy
R3 and R4 : Dispensed with

COMMON ORDER

C.R.P. (MD)No.2029 of 2015 is filed against the order passed in I.A.No.87 of 2011 in E.P.No.18 of 2006 in O.S.No.198 of 1999 on the file of the District Munsif, Tiruchendur, dated 16.04.2014.

2.CRP(MD)No.2353 of 2015 is filed against the order passed in I.A.No.89 of 2011 in E.P.No.18 of 2006 in O.S.No.198 of 1999 on the file of the District Munsif, Tiruchendur.

3.The revision petitioners herein are third parties to the suit. One Tharmapitchai is the first plaintiff. The first revision respondent is the second plaintiff, One Kurusamy is the third plaintiff, the second respondent herein is the fourth plaintiff, one Pappuammal is the first defendant. Third and fourth respondents are the defendants 2 and 3. Tharmapitchai has filed a suit in



O.S.No.198 of 1999 for specific performance against Pappuammal, Saravanamuthu (Third respondent herein) and Regunathan (Fourth respondent herein). The revision petitioners are the legal heirs of the third defendant.

4.The petitioners filed a petition in E.A.No.87 of 2011 for a prayer of impleading themselves in the Execution Proceedings. That petition was dismissed by the trial Court. The petitioners filed another petition to set aside the order passed against the third defendant in E.A.No.89 of 2011. That petition was also dismissed by the trial Court. Against the same, the revision petitioners filed these Civil Revision Petitions.

5.Brief substance of petition in E.A.No.87 of 2011 is as follows:-

The plaintiffs had filed a suit against the defendants 1 to 3. The third defendant is the husband of the first petitioner, and the father of the petitioners 2 and 3 and he was missing for the past 12 years. Nobody heard of him sofar. An *exparte* decree was passed against the defendants. The proposed parties are the legal heirs of the third defendant and it is necessary that they have to be impleaded in the execution proceedings.

6.Brief substance of the counter filed by the second respondent adopted by the fourth respondent, in E.A.No.87 of 2011, is as follows:-

The petition is not maintainable. It is wrong to state that the third defendant left the residence 12 years back. It is false to state that the petitioners are not aware of the *exparte* decree. The petitioners have no *locus standi* to be a party to the petition and prayed the petition to be dismissed.

7.Brief substance of petition in E.A.No.89 of 2011 is as follows:-

The respondents 1 to 4 are the plaintiffs in the suit and the petitioner in the Execution Proceedings. The respondents 5 to 7 are the defendants in the original suit. The seventh respondent is the husband of the first petitioner and father of the second and third petitioners. The seventh respondent / third defendant was missing for the past 12 years. Since the husband of the first petitioner was missing and since the petitioners 2 and 3 are small children, the first petitioner went to her father's house at Nanguneri. She came back to Tiruchendur, only recently and that the petitioners are residing in the suit property. On 26.06.2011, the first petitioner happened to see an advertisement in 'Malaimurasu' newspaper and came to know about the case. After consulting an Advocate, she came to know that a case for specific performance was filed against her husband and an *exparte* decree was passed on 10.11.2000. The husband of the first petitioner was missing for the past 12 years and hence, the petitioners are to be impleaded in the case. The petitioners



have filed a petition to set aside the *exparte* decree. If the petition is not allowed, the petitioners will be put into irreparable loss and hardship.

8. Brief substance of the counter filed by the second respondent, in E.A.No.89 of 2011, is as follows:-

It is wrong to state that the seventh respondent was missing for the past 12 years and his whereabouts are not known to the petitioners. It is wrong to state that the petitioners were residing in Nanguneri Taluk, Chinthamani Village. It is wrong to state that the petitioners came to know about the case, only through the paper publication in 'Malaimurasu', dated 26.06.2011. The reason for the missing of the seventh respondent is not clearly stated in the petition. The petitioners are not having any right to appear in the case.

9. The trial Court passed a speaking order, in E.A.No.87 of 2011, dismissing the petition and the trial Court dismissed I.A.No.89 of 2011, since I.A.No.87 of 2011 was dismissed.

10. Against the dismissal of both the E.A.'s, the revision petitioners approached this Court and filed C.R.P.(MD)No.2029 of 2015, to set aside the order passed in E.A.No.87 of 2011 and filed C.R.P.(MD)No.2352 of 2015, against the order in E.A.No.89 of 2015.

11. On the side of the revision petitioners, it is stated that the third defendant was missing from 1999 onwards and he is unheard of for the past 12 years. The *exparte* decree was passed against the third defendant, without proper service of notice. Section 108 of the Indian Evidence Act is applicable to the facts of the present case. A paper publication was published on 30.10.1999, in 'Daily Thanthi', by the petitioners, who are the wife and children of the third defendant, who are the natural legal heirs of the third defendant and that they have not heard about him from the year 1999 and there is a presumption that the third defendant is dead. No declaration is necessary with regard to a civil death. Such declaration is left for the Court to presume when an issue arises to decide whether a man is alive or dead. It is for the respondents to prove that the summons in the suit as well as in the execution petition were served on the third defendant properly.

12. On the side of the respondents, it is stated that the petitioners filed the revision petitions along with a delay excuse petition. When the delay excuse petition was pending, sale deed was executed on 24.08.2015 and the execution petition was closed. The execution petition was filed only for registration of the sale deed and the Execution Petition is now closed, there is nothing survives for adjudication. No purpose will be served in allowing the petition. No set aside petition was filed by the petitioners so far and prayed the petitions to be dismissed.



13. On the side of the revision petitioners, it is further stated that the suit was filed for specific performance. The alleged sale consideration is Rs.30,000/- and that Rs.25,000/- was alleged to have been paid as an advance and three years time limit was fixed for payment of Rs.5,000/-. No summon was served to the third defendant. Only a substitute service was taken, exparte decree was passed on the basis of a substitute service.

14. On the side of the revision petitioner, it is stated that a paper publication was given by the petitioners in 'DinaThanthi' daily newspaper, dated 30.10.1999. The suit was filed only after the missing of the third defendant and only after the same was printed in the paper publication, dated 30.10.1999.

15. On the side of the revision petitioner, it is stated that the suit was filed by the plaintiffs only by issuing a paper publication and the exparte decree was passed on 10.11.2000 and that only subsequent to the paper publication given in 'Malai Murasu' news paper, the petitioners came to know about the exparte decree. Thereafter, a petition, to set aside the exparte decree was filed in E.A.No.87 of 2011. There is no necessity to declare the civil death of the third defendant. Only when a dispute arise whether a particular person is dead or alive, the Court can come to a conclusion regarding the civil death. A statement of the petitioners has to be treated as proof for the missing of the third defendant. It is for the other side to prove that he is alive. The missing of the third defendant was not denied by the respondents, there is no such specific denial in the counter.

16. On the side of the revision petitioners, a judgment of the Hon'ble Supreme Court reported in 2004 (3) CTC- 552 [L.I.C. of India V. Anuradha], is cited, it is stated as follows:-

"On the basis of the abovesaid 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

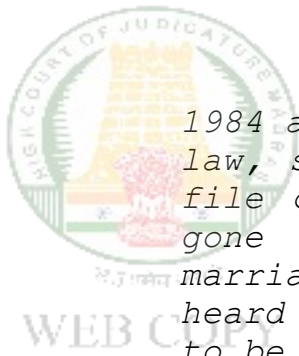


Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised 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."

17. Another judgment of this Court reported in **2021(3) L.W. - 193 [N.Thangamani @ Radhamani Vs. A.Velliangiri]** is cited by the revision petitioners, wherein, it is stated as follows:

9. Coming to non-joinder of Arunagiri, it is stated in the plaint that Arunagiri left the family in the year 1984 without getting marriage and his whereabouts is not known since then. Hence, as per law, it is presumed that he is dead. Respondent denies this case in his written statement and contends that recently he came to know Arunagiri is living in a village somewhere in and around Chinnasalem, Villupuram District. However, he has not chosen to implead Arunagiri as a necessary party under Order 1 Rule 10 CPC nor did he take any steps to summon him even as a witness. He did not reveal either to the appellant or to the Court the address and other necessary details which would have helped the appellant to implead Arunagiri as a party to the suit. Section 108 of Indian Evidence Act reads as follows:-

108. Burden of proving that person is alive who has not been heard of for seven years.- 1[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been A.S.No.596 of 2018 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 2 [shifted to] the person who affirms it." When he denied the claim that Arunagiri left the family in the year



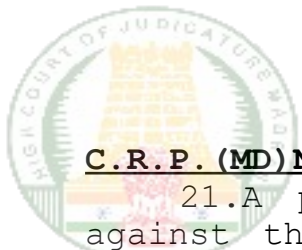
1984 and therefore it has to be presumed that he is dead in law, strangely in a suit filed in O.S.No.8 of 2009 on the file of Sub Court, Salem, he pleaded that "Arunagiri had gone out of the family even in the year 1984 without marriage and his whereabouts is not known. He has not been heard of since the year 1984. As such, in law, he is deemed to be "civilly dead".

This copy of the plaint has been marked as Ex.B1. Thus, it is clear from his own pleadings in O.S.No.8 of 2009 that the respondent admitted that Arunagiri left the family in the year 1984 and he has not been heard of since then. Now he has taken contrary stand when he positively allege that Arunagiri is living in a village somewhere near Chinnasalem, it is for him to prove that Arunagiri is alive and living, but he has not chosen to do so. Therefore, it has to be concluded on the basis of his pleadings in O.S.No.8 of 2009 and also the case of the plaintiff in this case that Arunagiri has not been heard of for more than 7 years by those, who A.S.No.596 of 2018 would have naturally heard him, if he had been alive. The logical conclusion that has to be drawn is that he is to be considered as "dead" in law. In this view of the matter, this Court finds that the finding of the learned trial Judge that the suit is bad for non-joinder of Arunagiri is not correct and dismissal on this ground is also not correct."

18.A judgment of this Court reported in 2009 (3) CTC-342 [The Motor & General Finance Limited, rep. by its Regional Manager V. S.Durailingam and another] is also cited by the revision petitioners.

19. On the side of the revision petitioner, it is stated that there was no necessity for the petitioners to claim civil death earlier. Only when an issue is raised they are claiming the same. The petitioners are residing in the suit property. Since the other defendants have no interest in the suit property, they failed to follow the case and they reported no instructions. A service under Order - 8 Rule -13 cannot be equated to actual service.

20.On the side of the respondents, it is stated that the suit decree was passed on 10.11.2000. Civil death was not pleaded in the E.A. Paper publication is not sufficient to prove civil death. That paper was not filed before the trial Court. No other document is filed to prove the civil death. No set aside petition was filed so far. No declaration of decree for civil death is obtained by the petitioners. E.P was closed, sale deed was registered and there is nothing survives for adjudication and prayed the revision to be dismissed.



C.R.P. (MD) No. 2029 of 2015

21.A perusal of the records reveals that a suit was filed against the defendants for specific performance in O.S.No.198 of 1999. No summon was served on the third defendant. Paper publication was effected and an *exparte* decree was passed. The case of the petitioners is that the third defendant was missing from the year 1999 and that the petitioners were not aware of the proceedings, since they went to the house of the first petitioner's father and were residing there. In the meanwhile, an execution petition was filed to execute the *exparte* decree. When the E.P. notice was published in the newspaper, the first petitioner came to know about the pendency of the Execution proceedings and she filed a petition to set aside the decree and to implead the petitioners in the E.P proceedings. Section 108 of the Indian Evidence Act, reads as follows:-

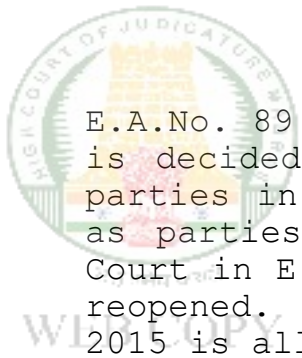
108. Burden of proving a person who has not been heard of for seven years as alive.- the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

22.The claim of the petitioners is that the third defendant left the house and he was un heard of for the past 12 years. Man missing intimation was published in the newspaper viz., 'DinaThanthi' on 30.10.1999, only subsequently, this suit was filed. Under Section 108 of the Indian Evidence Act and under the provision of C.P.C, there is no necessity for filing a suit for declaration of civil death. Only when a dispute arises as to the life or death of a particular person, question of civil death has to be considered. The burden is on the person, who claims that the particular person is alive.

23.The case of the respondent is that already sale was registered and the E.P was closed and there is nothing survives for adjudication. An opportunity for the revision petitioners to put forth their case has to be given, in the interest of justice. The sale deed was executed, when a petition under Section 5 of the Limitation Act, was pending before the Court. It is seen that the right of the revision petitioner will be affected by the order in the execution petition. An opportunity to put forth their case has to be given to the petitioners, in the interest of justice and hence, the revision petitioners are to be impleaded in the E.P petition.

C.R.P. (MD) No. 2352 of 2015

24.Only a single line order was passed by the Execution Court, which reads as follows: " since E.A.No.87 of 2011 was dismissed,
<https://hcservices.ecourts.gov.in/hcservices/>



E.A.No. 89 of 2011 was dismissed". In C.R.P.(MD)No.2029 of 2015, it is decided that the revision petitioners are to be impleaded as parties in E.P.No.18 of 2006. To implead the revision petitioners as parties to the E.P.proceedings, the order passed by the trial Court in E.P.No.89 of 2011 is to be set aside and the E.P has to be reopened. In view of the above circumstances, C.R.P.(MD)No.2352 of 2015 is allowed.

25.For the above reasons, both the Civil Revision Petitions are allowed and the order, made in E.A.No.87 of 2011, in E.P.No.18 of 2006 in O.S.No.198 of 1999, dated 16.04.2014 and the order made in E.A.No.89 of 2011, in E.P.No.18 of 2006 in O.S.No.198 of 1999, on the file of the District Munsif Court, Tiruchendur are hereby set aside.

26. Liberty is given to the revision petitioner to question the validity of the decree and the sale deed by initiating separate proceedings within a period of four months from the date of receipt of a copy of this order, if they are so advised. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

Ls

To

1.The District Munsif,
Tiruchendur.

2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+2 CC to M/s.G.RAJARAMAN, Advocate (SR-39625[F] & SR-39626[F] dated 20/12/2021)

+1 CC to M/s.H.Arumugam, Advocate (SR-39851[F] dated 21/12/2021)

C.R.P(MD)Nos.2029 and 2352 of 2015
20.12.2021