



S.A.(MD) No.133 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **20.10.2023**

CORAM:

THE HONOURABLE MR.JUSTICE **G.CHANDRASEKHARAN**

S.A.(MD)No.133 of 2021

1.S.Kulandaivel
2.S.Muthusamy
3.K.Saraswathi
4.K.Suresh
5.K.Suganthi

..Appellants

Vs.

1.The State represented by its
District Collector,
Karur District, Karur.

2.The Tahsildar,
Office of Manmangalam Taluk,
Karur District.

...Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree passed in A.S.No.15 of 2019 on the file of the Principal Sub Court, Karur dated 16.12.2019 by confirming the judgment and decree passed in O.S.No.353 of 2016 on the file of the Principal District Munsif Court, Karur, dated 05.02.2018.

For Appellants
For Respondents

:Mr.D.R.Murugesan
:Mr.N.Muthu Vijayan
Special Government Pleader



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JUDGMENT

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This appeal is filed challenging the concurrent judgments of Courts below in A.S.No.15 of 2019 on the file of the Principal Subordinate Court, Karur, confirming the judgment in O.S.No.353 of 2016 on the file of the Principal District Munsif Court, Karur.

2.The appellants filed the suit for declaration that (a) one Sadayappa Gounder son of Selebana Gounder is presumed to be dead; (b) the plaintiffs alone are the legal heirs of Sadayappa Gounder; (c) to grant an order of mandatory injunction directing the defendants to issue legal heirship certificate of the said Sadayappa Gounder; and (d) for costs and for other reliefs. The respondents/defendants did not file any written statement and contested the suit and were set *ex parte*.

3.During trial, PW-1 was examined and Ex-A1 to Ex-A4 were marked. The learned Trial Judge, on going through the oral and documentary evidence, found that the relief claimed in the suit cannot be granted and dismissed the suit. The finding of the Trial Court was confirmed by the first Appellate Court in A.S.No.15 of 2019. Thus, the Second Appeal came to be filed.



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4.While admitting the Second Appeal, the following substantial questions of law were framed:

“i. Whether the Courts below were right in not invoking the presumption under Section 108 of the Evidence Act to grant a declaration?

ii. Whether the evidence of PW 1 could be termed as insufficient to raise statutory presumption under Section 108 of the Evidence Act?”

5.It is the submission of the learned Counsel appearing for the appellants that the suit was uncontested by the respondents/defendants. Through evidence of PW-1 and Ex-A1 to Ex-A4, the appellants abundantly proved that Sadayappa Gounder was missing from 15.05.1997 and that the plaintiffs are alone his legal heirs. Instead of decreeing the suit on the basis of the unimpeachable evidence, both the Courts below have given a finding that the plaintiffs have not proved that Sadayappa Goundar was missing and negated the prayer.

6.In support of his submission, the learned Counsel for the appellants pressed into service the judgment of Andhra Pradesh High Court in ***Union of India represented by Secretary and others vs Polimetla Mary Sarojini and another***, in ***Writ Petition No.34859 of 2016***.



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7.It is the submission of the learned Special Government Pleader appearing for the respondents that the appellants/plaintiffs have to prove their case on the basis of their own pleadings and evidence. Merely because the respondents have not filed the written submissions and contested the suit, they are not entitled for the decree. Both the Courts below have rightly considered the evidence and negatived the prayer.

8.Considered the rival submissions and perused the records.

9.From the plaint averments, the case of the appellants/plaintiffs is that Sadayappa Gounder owns properties in Thirukkaduthurai Village. He married one Ramayammal and they had three sons, namely, Krishnan, Kulandivel and Muthusamy. They were living together. Due to some domestic disputes with his wife, Sadayappa Gounder went to depression. He left the home on 15.05.1997 without informing his wife and children and gone somewhere. Thereafter, he did not return. Despite thorough and sincere search made by his wife and children, they could not ascertain the whereabouts of Sadayappa Gounder. In the meanwhile, Ramayammal and Krishnan had died. In order to deal with the properties, it is necessary to get the legal heirship certificate of Sadayappa Gounder. In such circumstances, the suit was filed.



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10.As already stated, PW-1 was examined and Ex-A1 to Ex-A4 were marked. PW-1 is the third plaintiff in the suit. Ex-A1 to Ex-A4 were the copies of patta in the name of Sadayappa Gounder. Except marking Ex-A1 to Ex-A4, no other evidence was produced by the appellants. The reading of the judgment of the trial Court shows that no police complaint was given and no witness, who had known about Sadayappa Gounder, was examined to show that he was not heard for more than seven years prior to the filing of the suit. In the absence of any concrete evidence to show that Sadayappa Gounder went missing from 15.05.1997, the Trial Court found that the prayer sought for by the appellants cannot be granted and thus, dismissed the suit. That finding was confirmed by the first appellate Court also.

11.Section 107 of Indian Evidence Act 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.”

12.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 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.”



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13. Section 107 of Indian Evidence Act makes it clear that if a person was shown to alive within thirty years, the burden of proving that he is dead is on the person, who affirms it.

14. Section 108 is a proviso to Section 107. When a question arises as to whether a person is alive or dead, if it is proved that he has not heard of within seven years by those who naturally heard of him, the burden of proving that he is alive is shifted to the person, who affirms it.

15. Here is a case, where the plaintiffs sought to declare that Sadayappa Gounder as dead for the reason that he was not heard of by the persons, who knows him for the last seven years. However, in order to prove this claim, except the evidence of PW-1, who is the third plaintiff in this case, no other witness, who would naturally have heard of the existence of Sadayappa Gounder, had been examined, as a witness in this. When it is claimed that he was missing from 15.05.1997, there is not even a criminal complaint was given for his missing. No paper publication was given. When this elementary and fundamental requirements are not there and when legally accepted evidence is not available to show that Sadayappa Gounder went missing from 15.05.1997, this Court is of the considered view that dismissal of the suit by the Courts below cannot be faulted.



16.The reading of the judgment relied upon by the learned Counsel for the appellants discussed about the presumption under Sections 107 and 108 of the Indian Evidence Act. This presumption has to be confined only with the factum of death and not the actual date of death. It is pertinent to extract the relevant portion of the judgment:

“13.The burden of proof oscillates like a pendulum from the person, who asserts death, to the person who asserts life. To put it differently, the burden of proof cast under [Section 107](#) upon the person asserting death of another becomes lighter under [Section 108](#). While a person asserting death of another is obliged to prove positively under [Section 107](#) that the other person is dead, he is given an option or gateway under [Section 108](#) to prove instead, that the other person has not been heard of for seven years. In other words, the requirement under [Section 107](#) is to prove the factum of death. The requirement under [Section 108](#) is to prove a fact that would lead to a presumption of such a fact. The presumption under [Section 108](#), as in the case of every other presumption, is rebuttable, since a person asserting life is entitled under [Section 108](#) to show that the person presumed to be dead was actually alive.

14. Though the provisions of [sections 107](#) and [108](#) are very clear as to the rising of presumption, these sections do not throw any light upon the date on which a person can be presumed to be dead. In other words, the doubt or dilemma that arises in cases of this nature is as to the date of death of the person in respect of whom the presumption is raised. The moment it is established that a person has not been heard of for 7 years, the presumption of death arises. But the presumption under the Act is confined only to the factum of death and not to the actual date of death.”

17.As discussed above, this Court is of the view that, to discharge the burden placed on the appellants that Sadayappa Gounder had gone missing from 15.05.1997 and therefore, presumption has to be drawn that he is dead, is not proved by any legally admissible evidence. In this view of the matter, this Court answers the substantial questions of law as follows:



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i. For drawing the presumption under Section 108 of Indian Evidence Act, there is no evidence produced in support of plaintiffs' case.

ii. When there is no fundamental/basic evidence produced by the appellants with regard to the missing of Sadayappa Gounder from 15.05.1997, as discussed above, this Court answers that PW-1 evidence is insufficient to raise statutory presumption under Section 108 of Indian Evidence Act.

18. Accordingly, these substantial questions of law are answered and this Court finds that the Courts below have properly appreciated the oral and documentary evidence and rightly dismissed the suit and that does not call for any interference of this Court. Thus, the Second Appeal is dismissed. No costs.

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
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To

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- 1.The Principal Sub Court, Karur.
- 2.The Principal District Munsif Court, Karur.
- 3.The District Collector,
Karur District, Karur.
- 4.The Tahsildar,
Office of Manmangalam Taluk,
Karur District.
- 5.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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G.CHANDRASEKHARAN, J.

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