



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

FIRST APPEAL NO.694 OF 2023

Smt. Savitribai W/o Rajhans Ambagade
(Dead) through Legal Representatives :

1. Smt Pramilabai W/o Anil Moon, Aged 48 years, Occ- Household, R/o Dwarkapuri, Rameshwari Ring Road, Nagpur.
2. Ku. Ashvita D/o Amil Ambagade, Aged 20 years, Occu-student, R/o 74, Chandramani Nagar, Nagpur.
3. Prashant S/o Rajhans Ambagade, Aged 46 years, Occu-Service, R/o Lendra Park, near Chandan Nagar, Nagpur.
4. Prakash S/o Nilkhanth Ambagade, Aged 50 years, Occu – Service, R/o Narendra Nagar, Nagpur.
5. Shishir S/o Subhash Shende, Aged-38 years, Occu- Service, R/o Plot No.202, Prayas Regency, Godhani, Nagpur.
6. Shruti D/o Subhash Shende, Aged 32 years, Occu-Service, R/o Plot No.202, Prayas Regency, Godhani, Nagpur.

Through Power of Attorney Holder, Shri Subhash S/o Mahadeorao Shende.

...Appellants
(Originally Applicant)

// VERSUS //

1. Superintendent Engineer, Maharashtra State Road Development Corporation, Nagpur.
2. Additional Special Land Acquisition Officer, (Pench Project), Civil Lines, Nagpur.

3. Maharashtra Airport Development Corporation Limited, 1st Floor, Central Facility Building, MIHAN, Khapri ... Originally non-applicant Respondents (Railway), Nagpur.

Ms Rajkumari Rai, Advocate for Appellants.
Shri M.A. Kadu, A.G.P. for Respondent No.2.
Shri A.H. Adtani, Advocate for respondent No.3.

CORAM : SANJAY A. DESHMUKH, J.

DATED : 08/08/2024

ORAL JUDGMENT

1. **Admit.** Heard finally with consent of the learned Advocates for the parties.

2. This first appeal is preferred against the impugned judgment and award in L.A.R. No.236 of 2004 dated 26.10.2015 delivered by Special Court Designated Under MIHAN, (Ad-hoc District Judge-3), Nagpur.

3. The appellant prayed for enhancement of compensation of her acquired land for Mihan Project, Nagpur. The land reference was partly allowed. The respondents were directed to pay enhanced amount of compensation @ Rs.4,25,000/- per hector for Survey No.74 and 93 admeasuring area 2.28 H.R. and 1.65 H.R. respectively situated at village

Telhara, Tah. and Dist. Nagpur. This appeal is preferred for enhancement of compensation amount by the legal representatives of late Savitribai the original claimant.

4. The learned advocate for the appellants submitted and pointed out that in the similar land acquisition proceedings bearing L.A.R. No.232 of 2004 dated 23.03.2016, L.A.R. No.242 of 2004 dated 02.05.2016 and in L.A.R. No.243 of 2004 dated 02.05.2016 are decided wherein compensation @ Rs.10,00,000/- per hector was awarded by the same Special Court. But the appellants have not got amount of compensation at higher rate. It is against the principle of parity and injustice is caused to the appellants. Therefore, this appeal is preferred by the appellants.

5. The learned advocate for the appellants further submitted that, the original applicant/claimant did not adduce necessary evidence and therefore, an amount of compensation was not properly determined by the Special Court. She, therefore, prays for remanding the reference to the Special Court Mihan, Nagpur for adducing additional evidence and its decision on merit.

6. Respondent No.1 is absent though served.

7. The learned advocates for the respondent Nos.2 and 3 have strongly objected the prayer of remand of reference and submitted that, reasonable amount of compensation is awarded by the Special Court to the claimant and there is no need to remand the said reference. It is lastly prayed to dismiss this appeal.

8. The following point emerged for consideration :

(1) Is the case made out by the appellants to remand the Reference to the trial Court for recording additional evidence and for its decision on merit ?”

9. Perused the impugned judgment and judgments in L.A.R. No.232/2004, L.A.R. No.242 of 2004 and L.A.R. No.243 of 2004.

10. The admitted facts are that, the lands in L.A.R. No.242 of 2004 and L.A.R. No.243 of 2004 etc. were acquired by one and same notification which are situated in one and same village Telhara. The awards drawn up are also one and same. The L.A.R. No.236 of 2004 of appellants was decided earlier and other references were decided later on. More amount of compensation than this appellants was awarded to the claimants in the above noted cases. It is against the principles of parity and it certainly causes injustice to the appellants. However, Special Court did not err while deciding reference of this appellants. There was no such necessary evidence as adduced by the claimants in the other cases.

Therefore, in the interest of justice, the reference deserves to be remanded to the Special Court for adducing and recording additional evidence and decision on it.

11. The Special Court has to decide the said reference on the basis of parity, if the similar type of evidence is adduced by the claimants, on its own merit. Therefore, the remand of the said reference to the Special Court is justifiable in the interest of justice.

12. The learned Advocate for the appellants pointed out an order of this Court directing appellants to produce the heirship or succession certificate of the legal representatives of late Savitribai, who was original claimant. She submitted that it is not necessity to submit the succession or heirship certificate, as nobody has denied legal character of late Savitribai. The legal relationship as well as the status of these appellants as legal representative of late Savitribai is also not disputed by anybody. The original claimant Savitribai died after passing of the impugned judgment and award. She prayed that said order be called back and Special Court be directed to allow to amend the reference application to bring appellants as legal representatives of late Savitribai on record.

13. It would not be out of place to take note here that in case of missing persons, this Court noticed that many times the Courts, quasi-judicial authorities, statutory authorities, other law enforcing Officers or Officials, Banks, private institutes etc., while deciding the claims of legal heirs, are directing to produce the decree of declaration of the civil death from Civil Court, even though, that particular person is presumed to be dead as per Section 110 of the Bhartiya Saksha Adhiniyam, 2023 (for short 'the BSA Act'). (Old Section 108 of the Indian Evidence Act, 1872). The said presumption applies if he/she had not seen or heard by anybody for last seven years.

14. The Hon'ble Supreme Court has guided us in the case of *Sundarjas Kanyalal Bhathija & Ors., Vs. The Collector, Thane, Maharashtra & Ors.*, reported in *A.I.R. 1991 S.C. 1893* that, "it is duty of the superior Judges (of Supreme Court and High Court) and Tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers could be in a predicament and would not know how to advise their clients. Subordinate Courts would find themselves in an embarrassing position to choose between the conflicting opinions.

The general public would be in a dilemma to obey or not to obey such law and it ultimately falls into disrepute.” Considering these above guidelines, this Court is of view that law as to procedure must be cleared on this important issue for certainty of all stake holders.

15. The object of said presumption is to dispense with the proof of fact of death of such missing person which otherwise difficult to prove by positive evidence which can not be rationally expected. It can be proved by negative evidence with the help of said presumption that nobody heard and seen him for last sever years. It simplifies the procedure of proving of presumptive death. Thus, it is helping provision for speedy decision as to the presumptive death of such person. The BSA Act (old the Indian Evidence Act of 1872) is procedural statute and not substantive law. It does not create or extinguish any substantive right or liability for filing suit for granting decree like declaration of presumptive death. Section 110 of the BSA Act is procedural provision as to the burden of proof. It dispenses with the partial proof of the fact that person who has not seen and heard for more than seven years is presumed to be dead. It is only evidential presumption and only part of procedure of proving fact of presumptive death.

16. There are various kinds of presumptions under various laws i.e. presumptions of laws and facts, rebuttable and irrebuttable/

conclusive, general presumptions, presumptions as to burden of proof applicable to the civil and criminal cases in the different facts i.e. context, presumptions applicable for interpretation of statutes etc. The objects of various presumptions are different and depends upon various factors. Some times those are brought to protect weaker section of society rationally who cannot prove their case. The object of presumptions under Section 110 of BSA Acts under the heading of “**burden of proof**” is limited i.e. for partial dispensation of fact of proof of death of a person who is not seen and heard for seven years. The Legislature has as per Section 110 of the BSA Act rationally provided to infer fact of presumed death. It saves time of all concerned which is also object of the BSA Act. Thus, on proof of negative foundational facts that nobody seen and heard such person for seven years, the inference as to presumptive death can be drawn.

17. The death has been defined in the Registration of Birth and Death Act, 1969 as follows :

Death means the permanent disappearing of all evidence of live at any time after the live birth has taken place.

18. As far as various kinds of death are concerned, the following words and their meanings as per Blacks Law Dictionary are to be seen and considered :-

I) DEATH :

The end of life. The cessation of all vital functions of all body parts. It is physical or natural death.

II) CIVIL DEATH :

The civil death means loss of rights i.e. right to vote, right to make contract, right to inherit property, i.e. loss of right to sue by person if he is convicted in serious crime or person who have left the temporal world for spirituous purpose by entering a monastery i.e. renunciation of world etc.

III) PRESUMPTIVE DEATH :

The death to be inferred from long unexplained absence usually after seven years.

IV) LEGAL DEATH :

The legal death may be by any of above modes including brain death etc. excluding physical death.

19. There is distinction between presumptive death and civil or legal death. There is vast distinction between presumption and legal / statutory fiction. There is basic distinction between presumption and implied law. There is also distinction between presumption and deeming clause/provision. These legal words/terminologies are having different meaning and features, different ambit and scope, different purpose and object, different utility and effects, depending upon its applicability and inapplicability in the context of case. Therefore, facts of each case are

decisive. The “**presumptive death**” is legally different and it shall not be prefixed or suffixed with any of the above words having different legal meaning to restrict or expand its scope, object and purpose. If word presumption is mixed and used by prefixing or suffixing with any of above different legal terminologies/words, it will be the kind of misnomer like fictional death, civil death, legal death, deemed death etc. which must be avoided. It is “**presumptive death**” as intended by legislature in Section 110 of BSA Act.

20. In the Registration of Birth and Death Act, 1969, presumptive and other kinds of deaths are not defined. There is no any express or implied provision as to noting or registering of presumptive death in the Birth and Death Register and the issuance of death certificate as is provided in case of natural death of the person. This Act does not mandate the decree of declaration of presumptive death from the Civil Court. The legislature has not provided in any statute the separate procedure for claiming and requiring decree of declaration of the presumptive death from Civil Court regarding such missing person. As per Sub-section 3 of Section 13 of the said Act provides that District Magistrate, Sub-Divisional Magistrate or Executive Magistrate may decide, if any delay is caused for giving information as to the birth or death of a person and grant or refuse to grant permission to register it. By

the Amendment of 2003 in Section 13 of the said Act, now a Judicial Magistrate of the First Class is excluded and no such application before him can be filed. But there is no any provision in the said Act as to what is to be done if there is presumptive death.

21. The presumptive death is an effect of happening of certain events. The death of a person either natural, presumptive or civil causes legal effect on many aspects of life of his/her relatives/legal heirs particularly rights and liabilities regarding marriage, debt, succession, property issues etc. The legislature has taken cognizance of presumptive death and simplified the law regarding proof of it by providing presumption to dispense with proof which is otherwise difficult to prove by negative evidence. After seven years, either of the spouse may pray for divorce on the ground of presumptive death as per sub-section 1 (vii) of Section 13 of the Hindu Marriage Act, 1955 and other personal laws as well. In such matrimonial cases and other cases, Court dealing with such issue may adjudicate existence or non-existence of his/her presumptive death as fact finding Court with the help of presumption as to presumptive death as provided under Section 110 of the BSA Act which dispenses with the part of proof.

22. There is no any law which requires/mandates the declaration of presumptive death by the decree of Civil Court. The object of law is to create certainty so that society will act accordingly to solve their legal problems. The law regulates actions of propels in society. The “Heirship certificate” can be obtained/granted as per the provisions of Bombay Regulation VIII Act, 1827 in respect of any property. Similarly, the “Succession certificate” can be obtained/granted as per Section 372 of the Indian Succession Act, 1925 for debt and securities. The legal heirs or legal representatives of dead person have legal remedies in these two statutes. The inference as to the existence of presumptive death can be drawn up with the help of presumption under Section 110 of BSA Act in such proceedings. Needless to mention that standard of proof in such civil cases is preponderance of probability. These two statutes are substantive laws helpful for determining right to heirship/succession to the property of the presumed dead person etc. Some procedure is also provided in the Indian Succession Act, 1925. The effective procedure for deciding such applications is provided in the Chapter XIV of the Civil Manual for its speedy decision. The pubic citations are issued in the news papers, objections are invited and claims are decided on affidavits. Those applications for heirship or succession certificates are decided summarily i.e. speedily. However, on the insistence of Court etc. unnecessarily, civil suits are filed for claiming relief of declaration of a

presumptive death, even though no any cause of action arose for it and particularly when equally efficacious legal remedy is available as provided for it in these two substantive statues.

23. For claiming any declaration, the basic requirement of Section 34 of the Specific Relief Act, 1963 is that somebody must be interested in denying the legal character of such person otherwise such relief cannot be granted. Generally, nobody denies the legal character of such missing person as to his properties etc. and rights and liabilities of his/her legal representatives / heirs in it, except the exception.

24. If reliefs of heirship or succession certificates can be granted to the legal heir of the naturally dead person, similar relief must be granted to the legal heir of the missing or disappearing person who is presumed to be dead. The same relief of heirship or succession certificate cannot be refused to the legal heirs of the person who is presumed dead. The legal representatives/heirs of the persons presumed to be dead and naturally dead must be treated equally on the principle of parity. In such cases, **the principle of equality before law as per Preamble and Article 14 of the Constitution of India must be followed by Courts and statutory Authorities etc.** There is no any law which permit and justify such discrimination. This procedure and practice is followed in our country

for years together and succession or heirship certificates are issued by Courts. However, sometimes in such summary proceedings also Courts and statutory authorities etc. are directing to produce the decree of declaration of presumptive death from Civil Court, though they are not legally authorised by any of law. There is no such express or implied power to demand declaration of presumptive death. In such fact situation, asking decree for declaration of presumptive death is unwarranted. It certainly creates unnecessary burden of such cases with existing burden of huge number of civil cases on the Civil Courts, which is not intended by legislature or by any law. Such certificates are granted by holding summary inquiry speedily. But in a civil suit it has to be decided on merit by framing issues, adducing evidence etc. It is lengthy procedure and it require years together for decision on merit. Already the Civil Courts are flooded with the huge number of cases. The Hon'ble Supreme Court in case of *Hukum Singh Vs. State of Punjab* reported in **(2000) 7 SCC 490**, held that **time has come to make every possible efforts to lessen the workload of the Courts particularly those Courts which are crammed with huge cases.**

25. By demanding decree of presumed death, troubling and teasing legal heirs of such presumed dead person to wait for justice is not justifiable. They will be deprived from speedy justice as contemplated by

Article 21 and Preamble of our Constitution which states that no person shall be deprived of his/her liberty and justice. The Court and authorities cannot avoid their duties to decide such presumptive death summarily, if it is denied, it is also injustice by legal mischief against persons in need of justice. The unreasonable delay may cause for obtaining such decree of presumptive death from Civil Court which will certainly create many hurdle like delay to exercise the rights of legal heirs of such presumed dead person, who have already suffered many problems because of such family member's disappearance for more than seven years.

26. To file such suit for declaration of presumptive death, the prior statutory notice under Section 80 of the Civil Procedure Code, 1908 needs to be served to the Collector. Then party has to wait for statutory period of two months. The Government has to bear the expenses of paying fees to the Government pleader etc. The Government is arrayed as defendant to such suit unnecessarily even though it has not denied and not interested in denying legal character of such presumed dead person. The legal heirs of such person have to bear expenses of such litigation without any legal and justifiable reasons. The parties have to wait for years together for such adjudication from civil Courts and till then their many issues e.g. decision as to pension, LIC benefits, Loan and money transactions, remarriage etc. remains undecided. They will

certainly suffer and it is injustice with them. It is judicially noticeable fact that there are lakhs of cases pending in the various Court's in India for years together and peoples are waiting for justice. The Supreme Court and High Courts in *catena* of decision directed District judiciary to decide cases speedily. It is pertinent to note that Hon'ble Supreme Court has recently in the case of *Yashpal Jain Vs. Sushila Devi*, reported in *AIR 2023 SC 5652* given directions and plans of actions for speedy disposal of old cases to the District Judiciary of our country and in para No.27 of it observed that **misuse of process of Court shall not be allowed**. In para No.26 it is also observed about the delay that **there is philosophy of procrastination (delaying tactics) of many Judges and lawyers**. Therefore, burdening Civil Court with such litigations for such decree of declaration of presumptive death is judicially, legally, practically and rationally not justifiable. Therefore also directing and demanding decree of declaration of presumptive death is unwarranted. Hence, practice to ask to file suit for declaration of presumptive death and to bring decree from Civil Court needs to be deprecated. It is also held by this Court in the judgment of *Vijaya Shrikant Revale ..vs.. Shirish Shrikant Revale and Ors*, reported in MANU/MH/3674/2016, that such declaration cannot be claimed and not also necessary.

27. It is also pertinent to note that, the legal effect of judgment and decree of declaration of presumptive death is that, it is a judgment in *rem* having future serious legal consequences. In case, the person who is declared as presumed dead by decree of Civil Court if fortunately returned then in that circumstance, that person has to file another suit to declare him that he is alive, to nullify earlier decree of declaration of presumptive death. Thus directing parties to bring decree of presumptive death is kind of giving birth to the new litigation without any legal justification, which is not expected and warranted by any law. Such action causes delay to other cases and creates multiplicity of judicial proceedings. Needless to state that justice delayed is justice denied. It is duty of all of us to not to allow to create such multiplicity of judicial proceedings. It creates hurdle in progress of our country. It is kind of injustice by justice delivery system. **The Court, statutory authority, other Government officers and officials etc. must know which law is to be applied and which law shall not be applied. They must know their legal limits as to what they cannot do and what they can do. Law and powers are provided for convenience of litigants and for giving justice. Unless there are express or implied legal power vested in the Court or authorities etc., it can not give such directions for bringing decree of declaration of presumptive death in proceeding of heirship or succession certificate.**

Because these two statutes provides summary procedure and effective speedy remedy for issuing it.

28. The Courts in such proceeding pending before it as per Rule 5 of Order XXII of the Code of Civil Procedure, 1908 can summarily conduct limited inquiry and can decide as to whether there is existence of alleged presumptive death which can be summarily and formally proved with the help of presumption and no separate suit needs to be filed for a decree of declaration of presumptive death in such circumstances. Thus, Court cannot avoid and refuse limited / summary inquiry to decide existence of presumptive death in the applications filed for succession or heirship certificates or in any other pending proceedings. Therefore, Courts, Revenue Officers, Statutory Authorities, Head of Government Departments, Banks, finance institution and other Offices cannot direct or force the parties to bring such decree from Civil Court as matter of course in case of presumptive deaths instead of claiming succession or heirship certificate, as the case may be. Such claims are decided on the basis of affidavits by the Court summarily. However, if any falsity, cheating etc. is noticed, such person can be punished under Section 237 and 318 of the Bhartiya Naya Sahita, 2023 (old Sections 200 and 420 of the Indian Penal Code, 1860) for giving and using false declaration and cheating.

29. A mute question may arise therefore, it is clarified that such decree for declaration of presumptive death shall not be claimed and granted only because there is right and therefore, there is remedy as per the principle of *ubi jus ibi remedium*. This principle will be applicable only when the remedy is not provided in any statute for enforcing rights, liabilities etc. Therefore, if there is no any law providing particular relief, then on the basis of principle of *ubi jus ibi remedium*, under Section 9 of the Code of Civil Procedure, 1908, etc. the Court can grant that relief if issue of existence of legal right and liability etc. is denied by somebody having legal right i.e. *locus standi* to deny or challenge it otherwise not. It is because there are two statutes which are providing effective and equally efficacious remedy of getting heirship and succession certificates as discussed above which suffice the purpose.

30. In case of presumptive death, statutory remedies are provided as held above. Therefore legislature cannot be blamed that there is no such law which provides effective legal remedy in case of presumptive death. Thus, legal effect of presumptive death and remedy for it is sufficiently taken care of by the legislature as discussed above.

31. In this case after remand, the original reference would be restored to the stage of hearing. Therefore, by adopting the usual

procedure of Order XXII of the Civil Procedure Code, 1908 (for short, "the CPC"), the Special Court can decide summarily i.e. with limited inquiry as to who are the legal representatives of deceased claimant late Savitrabai without asking heirship or succession certificate to them. Such issues can be decided on an affidavit of the persons claiming to be legal representatives. But in future, if any falsity of claim is noticed, he/she can be held liable for giving false evidence as discussed above. Such practices as to decision on the basis of claim affidavit are mostly followed by the statutory authorities and Government officers and officials etc. in most of such cases without compelling parties to go to the Court for bringing decree of the presumptive death.

32. In this case also, succession certificate or heirship certificate etc. are not necessary specially when nobody is denying and interested in denying the fact of death of original claimant late Savitribai. Therefore, an order passed by this Court directing appellants to submit succession or heirship certificate is called back. The Court can correct its own mistake. We all are for correcting mistakes. However, if such question of legal representative arises, the Special Court can adjudicate it summarily if objection is raised by a person having *locus standi*.

33. As observed and held above, the reference deserves to be remanded for recording additional evidence of the appellants in the Special Court for its fresh decision on merit. The point No.1 is, therefore, answered in affirmative. The impugned judgment and award deserves to be set aside. The appeal deserves to be allowed. Hence, the following order :

- i) The appeal is **allowed**.
- ii) The impugned judgment and award passed in L.A.R. No.236 of 2004 dated 26.10.2015 is set aside and reference is remanded to the Special Court, Nagpur under MIHAN Project for adducing additional evidence of appellants and respondents and for fresh decision of it on merits.
- iii) The Special Court Designated under MIHAN, Nagpur is directed to rehear the reference by allowing the amendment in the land reference application by permitting appellants to bring themselves as legal representatives of original claimant late Savitribai on record as per Order XXII of the CPC and if it is necessary to adjudicate summarily as to whether the appellants are legal representatives of late Savitribai or not ?

- iv) The L.A.R. No.236 of 2004 is more than 20 years old therefore, learned Special Court, Nagpur designated under MIHAN is directed to decide it within **six months** by keeping its dates of hearing at least once in a week.
- v) Inform the Special Court accordingly by sending copy of this judgment.
- vi) No costs.

(SANJAY A. DESHMUKH, J.)

C.L.Dhakate