ANDHRA PRADESH HIGH COURT

Kottapalli Venkateswarlu

Vs.

Kottapalli Bapayya

Appeal No. 161 of 1951

(Subba Rao, C.J. and Satyanarayana Raju, J.)

03.10.1950. 09.10.1956

JUDGMENT

Satyanarayana Raju, J.

1. The plaintiff has preferred the above appeal against the decree of dismissal passed by the Subordinate Judge's Court of Guntur in O. S. No. 118 of 1949.

2. The following pedigree would be useful in appreciating the contentions raised in the appeal :

3. Venkayya, Bapayya, Tirupatayya and Raghavayya are the sons of Narasayya. They effected a partition of the family properties in the year 1937. In that partition the property mentioned in the plaint schedule was allotted to the share of the third brother Tirupatayya. Ramayya, the 2nd defendant, is the natural son of the 1st defendant but was adopted by Venkayya, the eldest of the four brothers. The plaintiff is the son of the last of the brothers Raghavayya. On 17th of February, 1941, Tirupatayya executed a will (Exhibit B-1) giving his wife Tulasamma a life-interest in one acre of land and 30 square yards of site. He gave the remaining properties and the vested remainder in the property to his wife, to his three brothers Venkayya, Bapayya and Raghavayya, to be enjoyed by them in equal shares with absolute rights subject to, the obligation of discharging his debts in equal shares. Disregarding the provisions of the will of her husband, Tulasamma instituted O. S. No. 206 of 1941, on the file of the District Munsif's Court, Guntur, for maintenance against her husband. That suit was compromised and a deed of compromise executed, by which it was provided that Tulasamma should be given nine ankems of paddy per year for her maintenance. It appears from the record that Tirupatayya died some time in October, 1942. Not content with the provisions made in the compromise decree in O. S. No. 206 of 1941, Tulasamma raised disputes with her husband's brothers at about the time of his death. These disputes were composed by the execution of a maintenance deed dated 23rd of November, 1942, by Venkayya, and Bapayya for himself and his minor sons in favour of Tulasamma. Raghavayya was not a party to this maintenance deed. Venkayya and Bapayya obtained possession of all the properties bequeathed under the will of Tirupatayya after his death. It also appears from the record that Raghavayya disappeared and has not been heard of and his whereabouts not known since the year 1941. In 1947, Bapayya filed a petition under Section 7 of the Guardians and

Wards Act in which he prayed that he might be appointed as the person and property guardian of the son of Raghavayya, the plaintiff in the present action. On the 5th of February, 1948, Kameswaramma, the next friend of the plaintiff, caused a lawyer's notice, Exhibit B-2 to be issued to defendants 1 and 2 alleging that they were unjustly in possession of the entire properties of Tirupatayya and declining to effect a partition of the third share of the minor plaintiff in spite of various demands. On the 20th of September, 1948, the District Court, Guntur, passed an order in O. P. No. 2 of 1948, appointing Bapayya, the 1st defendant, as the guardian of the person of the plaintiff and appointing Kameshwaramma as the property guardian of the plaintiff and his sisters. Kameswaramma thereafter sought permission of the Court to institute a suit on behalf of the plaintiff for partition and recovery of separate possession of a third share of the properties of Tirupatayya as per his will. Pursuant to the order dated the 26th November, 1948, permitting her to file a suit, Kameswaramma instituted the present action for recovery of a third share of the properties of Tirupatayya. Bapayya, brother of Raghavayya, was the 1st defendant in the suit and Ramayya, his natural son, who was adopted by Venkayya, was the 2nd defendant. Defendants 3 and 6 are in possession of item 8 of the plaint schedule properties and the 4th defendant is in possession of item 4 of the said schedule. They have been impleaded as persons claiming as alienees from defendants 1 and 2.

4. Defendants 1, 2 and 4 in a common written statement contended inter alia that Raghavayya, one of the legatees under the will of Tirupatayya, committed suicide in November, 1941, by drowning himself in the river Krishna and he did not survive the testator and therefore the legacy lapsed to the legatees. Defendants 3 and 5 contended that the 3rd defendant was not necessary party to the suit, that the 5th defendant purchased item 8 along with some other property of defendants 1 and 2 from one Punnaiah, who himself purchased the property from defendants 1 and 2. The 5th defendant claimed that he was a *bona fide* purchaser for value without notice of the rights of the plaintiff. The 6th defendant, who was subsequently added by an order dated the 2nd of December, 1949, pleaded that the plaintiff had to prove that Raghavayya survived the testator and that the legacy did not lapse. He also claimed that himself and his vendor were *bona fide* purchasers, for value without notice.

5. The burden of establishing that Raghavayya survived the testator Tirupatayya is on the plaintiff, inasmuch as under Section 105 (2) of the Succession Act, in order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator. This burden is sought to be discharged in two ways by oral evidence, and by invoking the presumption under Sections 107 and 108 of the Evidence Act. The learned Subordinate Judge held that the oral evidence adduced on behalf of the plaintiff to establish that Raghavayya, survived his brother Tirupatayya, could not be accepted. He held that equally unacceptable was the version of the defendants that Raghavayya committed suicide in November, 1941. He therefore considered the question as to whether the plaintiff would be entitled to invoke the presumptions under Sections 107 and 108 of the Evidence Act, and held that it was not open to the plaintiff to invoke these presumptions. On these findings, he dismissed the plaintiff's action. Hence this appeal by the plaintiff

6. It is contended by the learned counsel for the appellant that when once the plaintiff's father Raghavayya was found to be alive in 1940, the burden of proving that he did not survive the testator lay on the defendants and that the lower Court should have held that the plaintiff was entitled to rely upon the presumptions under Sections 107 and 108 of the Evidence Act.

7. It therefore becomes necessary for us to consider the exact scope of the presumptions under those sections. Sections 107 and 108 are in the following terms:

> "107. 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. 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."

8. The learned counsel for the appellant contends that when a person is not heard of for seven years and no specific date of death can be proved, the earliest date on which death can be presumed is only the date on which the suit was filed, and in support of this contention, strong reliance is placed upon a recent decision of our High Court in *Ramanna v. Appayya*[1], At page 139 the learned Judges Viswanatha Sastri and Bhimasankaram, JJ., summed up their conclusions thus:

> "The presumption under Section 107 of the Evidence Act merely extends to the fact of death at the expiration of 7 years and not to the time of death at any particular period. There is no presumption that the death took place at the end of the period of 7 years or at any other particular time within that period. The exact time of death is not a matter of presumption but of proof by evidence. The onus of proving that death took place at a particular time within the period of 7 years lies on the person who claims a right to the establishment of which that fact is essential. If the exact date of death is not proved, the earliest date on which death can be presumed under Section 108 of the Evidence Act is the date on which the suit was filed. The presumption under Section 108 cannot have a retrospective effect. (See *Lalchand Marwari v. Ramrup Gir*[2],).

9. We have examined the decision of the Privy Council in 50 Mad LJ 289 , to find whether it lends support to the observation in the passage above cited that if the exact date of death is not proved, the earliest date on which death can be presumed under Section 108 of the Evidence Act is the date on which the suit was filed. Their Lordships of the Judicial Committee extracted the following well-known passage from *In re Phene's Trusts*[3]:

> "If a person has not been heard of for seven years, there is a presumption of law that he is dead : but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took

[1]1956 Andhra W. R. 137 [3](1870) 5 Ch App 139
[2] 50 Mad LJ 289

> place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

10. They proceeded to state :

> "Following these words, it is constantly assumed - not perhaps unnaturally - that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This of course is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one of not less than seven years."

11. Their Lordships made it clear that there is only one presumption and that is when the suits were instituted, the person about whose disappearance the presumption is sought to be drawn, was no longer alive but that there is no presumption at all as to when he died and that like any other fact, is a matter of proof. It is this view which has been informally adopted by the Madras High Court. In *Band Veeramma v. Gangala Chinna Reddi*[4] the rule has been stated thus :

> "There is no presumption in law that a person was alive for seven years from the time when he was last heard of. Sections 107 and 108 of the Evidence Act deal with the procedure to be followed when a question is raised before a Court, as to whether a person is alive or dead, but do not lay down any presumption as to how long a man was alive or at what time he died."

12. In *Venkata Hanumanulu Garu v. Lachamma*[5] a Division Bench reiterated the same rule in the following words :

> "It is settled law that when the question is not merely one of death, but death at a particular time, there is no presumption as to such time, but that the party who has to make out that the death occurred on a special date, must prove it by evidence."

13. In *Thiagaraja Mudaliar v. Kandaswami Mudali*[6] a Division Bench of the Madras High Court followed the case (1870) 5 Ch App 139 .

14. In *Vithabai Dattu v. Malhar Shankar*[7] a Division Bench of the Bombay High Court held that when the Court has to determine the date of the death of a person who has not been heard of for a period of more than 7 years, there is no presumption that he died at the end of the first 7 years, or at any particular date, and the presumption then is that the person was dead at the date of the suit.

[4] ILR 37 Mad 440: AIR 1914 Mad 505 [6]19 Mad LJ 502
[5]14 Mad LJ 464, [7] ILR (1938) Bom 155

15. In *Punjab v. Natha*[8] a Full Bench of the Lahore High Court held that if a person was not heard of for 7 years, when a suit is instituted, Section 108 of the Evidence Act comes into operation and raises a presumption that at the institution of the suit he was dead, but no

presumption as to the date of the death can arise and the date of the death has to be proved by the plaintiff in the same way as any other relevant fact in the case.

16. The learned counsel for the appellant, however, relied upon a decision of the Bombay High Court in *Jeshankar v. Bai Divali*[9] where the following passage occurs :

> "A man is presumed to be alive until he is dead. A person asserting that a particular man is dead has to prove it. If he can show that the man had not been heard of for seven years, then the Court will presume the death : See *Rango v. Mudiyeppa*[10] But the earliest date to which the death can be presumed can only be the date when the suit was filed. It cannot have a further retrospective effect."

17. Reliance is also placed on *Wali Mahommed v. Gaman*[11] where the following observations were made :

> "Where there is a dispute in a suit as to the date of death of a person from whom his relations have not heard for more than seven years, it shall first be for the person who alleges a particular date to prove that date affirmatively, but if no one can prove any specific date then the Court shall draw a presumption that he was dead on the date of the institution of the suit."

18. The same passage occurs at page 825 of Sarkar on Evidence, ninth edition :

> "Where a person is not heard of for seven years and no specific date of death can be proved, the earliest date to which death can be presumed can only be the date on which the suit was filed. It cannot have a further retrospective effect."

19. Now, the question is whether there is any warrant either on the language of the section or on the authority of the decided cases, for the view that if the exact date of death is not proved, the earliest date on which the death could be presumed is the date on which the suit was filed. The true rule is that the presumption under Section 108 of the Evidence Act extends to the fact of death at the expiration of 7 years and not to the time of death at any particular period. There is no presumption that death took place at the end of 7 years or at any particular time within that period. The exact time of death is not a matter of presumption but of proof by evidence, and the onus of proving that death took place at a particular time within the period of 7 years lies on the person who claims a right for the establishment of which that fact is essential. If that is the true rule, death cannot be presumed to have occurred on the date on which the suit was filed. It may be presumed that the man is not alive by the date of the institution of the suit; but the presumption cannot be that he is dead on that date. That

[8] ILR 12 Lah 718 : AIR 1931 Lah 582
[9] AIR 1920 Bom 85
[10] ILR 23 Bom 296.
[11] AIR 1944 Pesh

this is the correct view follows from the decision of the Privy Council in 50 Mad LJ 289 : AIR 1925 PC 9) (B). At page 321 (of ILR Pat) : at (P. 11 of AIR) their Lordships took care to point out :

> "There is only one presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a. matter of proof."

The presumption, therefore, can be that a man is not alive by the date of the institution of the suit but to say that a presumption can be made that the is dead on that date may not be the correct way of stating the rule. What the learned Judges apparently meant in 1956 Andhra WR 137, is only that the presumption can be that a man is not alive by the date of the suit.

20. It is then contended that it was for the defendants to prove that Raghavayya did not survive the testator. The short answer to this contention is that the defendants discharged the initial burden by relying upon the presumption. If so, it is for the plaintiff to establish by positive evidence that Raghavayya was alive subsequent to the death of Tirupatayya. This the plaintiff has not succeeded in establishing. The oral evidence adduced for the plaintiff has not been accepted by the lower Court and we find no valid reason to disagree with the appraisal of the evidence made by the lower Court.

21. For these reasons we hold that the appeal must fail and it is dismissed with costs. In our opinion, the order made by the lower Court with regard to costs needs no interference. The Memorandum of Cross-Objections must therefore be dismissed with costs.

Appeal dismissed.