

(1990) 02 KL CK 0046

High Court Of Kerala

Case No: C.R.P. No. 2256/89 G

Georgekutty

APPELLANT

Vs

Ouseph Varkey

RESPONDENT

Date of Decision: Feb. 9, 1990

Acts Referred:

- Evidence Act, 1872 - Section 107, 108

Hon'ble Judges: Radhakrishna Menon, J

Bench: Single Bench

Advocate: K. Raman and K.G. Pavithran, for the Appellant; K. Ravindranathan Nair, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Radhakrishna Menon, J.

The Plaintiffs in O.S. 130/84 before the Sub Court, Kottayam are the revision Petitioners.

2. The Petitioners were sureties for the transactions, one Mathew Joseph was alleged to have had with certain strangers in connection with procuring of jobs for them at his place of employment. The case of the Plaintiffs is that Mathew Joseph failed to get employment to those persons and therefore the Petitioners, being the sureties had to repay the said persons the monies, Mathew Joseph had taken from them. To recover the monies thus repaid, the Petitioners filed the suit, O.S. 130/84 against Mathew Joseph. The suit was decreed ex parte on 1st December 1984. The petition to execute the decree was filed in 1987 as E.P. 45/87. The Respondent herein one of the legal representatives of Mathew Joseph filed E.A. 941/88 in the E.P. for a declaration that the decree is incapable of execution as the same was obtained against a dead person. He in support of this contention pressed into service Sections 107 and 108 of The Indian Evidence Act. The court below after considering the

various aspects of the said contention has, by the order under challenge, declared that the decree is incapable of execution.

3. That the parties had approached this Court once before, can be seen from the order in C.R.P. 42/1989. This Court, as is seen from the said order dated 22nd February, 1989 set aside the order of the executing court refusing to decide the issue namely whether the decree is void and hence not capable of execution, on the ground that there was no prayer in the petition for such a declaration and remanded the said issue to the executing court for a disposal on merits. The following excerpt from the order gives a true picture of the respective cases set up by the parties and considered by this Court.

The decree obtained by the Respondents (Petitioners herein), according to the Petitioner (Respondent herein), is null and void and therefore incapable of being executed. The reason given by the Petitioner in the application from out of which this revision arises is that the judgment-debtor was not heard of for more than seven years and therefore he must be presumed to be dead at the time when the decree was passed. In other words the decree is one passed against a dead person and therefore it is a nullity, incapable of execution.

4. That the parties to a remand order are bound by the said order is beyond dispute. It is relevant in this context to keep in view a fairly well settled principle that even a wrong decision of a court having jurisdiction is as much binding on the parties thereto as a right one unless it be that the said decision is superseded by appellate or revisional orders of higher tribunals or reviewed by the said court provided law recognises the same. It therefore follows that if the higher court/tribunal has acted within its jurisdiction in remanding a case/matter/issue/question it is the duty of the subordinate court/authority to carry out the direction contained in the order of remand and retry the case/issue/matter/question because but for the order of remand the subordinate court/authority had no sesin of the case/matter/issue/question. The jurisdiction" to retry the case/matter/issue/question is circumscribed by the order of remand (See Achutan Nair v. Raman and Ors. 1979 KLT 119. This being the position in law as regard the right of parties to a remand order, neither the Petitioners nor the Respondent herein is entitled to take up questions which do not come within the purview of the remand order. The question as to whether the executing court can declare a decree a nullity unless it be that the defect of want of jurisdiction etc., is apparent on the face of the record, does not arise for consideration because, as already noted, that question has not been remanded to the executing court for a fresh consideration. The arguments advanced by the counsel for the parties on this question therefore are not necessary to be considered.

5. The only question thus arising for consideration is, whether the decree obtained by the Petitioners herein is capable of execution against the Respondent and other legal heirs of Mahew Joseph, the judgment-debtor.

6. Facts relevant and requisite to consider this issue lie in a narrow compass. Since the year 1979, the whereabouts of Mathew Joseph were not known to any. There is no dispute about it. The suit was filed in the year 1983 and the same was decreed on 1st December, 1984. The E.P. 45/87 was filed in the year 1987. These facts are also not disputed. On receipt of the notice of sale of the properties of Mathew Joseph, the Respondent herein filed the E.A. for stay of execution of the decree on the ground that the decree is incapable of execution as the same was one passed against a dead person. This application was rejected by the executing court and that order was under challenge before this Court as is seen from the order in C.R.P. 42/1989. It was the said revision that was allowed and the question was remanded to the court below as noted above.

7. That Mathew Joseph has not been heard of for more than seven years when Petitioners filed the E.P. in the year 1987, is beyond dispute. That he was last seen only in May, 1979 is admitted and hence beyond challenge. That means he was continually absent for a period of seven years unheard of even by persons who would naturally have received intelligence from him. He can therefore be presumed to be dead. A reference in this connection to Section 108 of the Indian Evidence Act is profitable. Since this section is a proviso to Section 107, it is necessary to refer to Section 107 also if we want to understand the real content of Section 108. These sections read:

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.

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

From the clear, plain and unambiguous language employed in these section it is clear that the initial burden to prove that the person who was shown to be alive within thirty years, is dead, is on the person who asserts that he is dead. He however, will be said to have discharged that burden on his establishing that that person has not been heard of for seven years by those who would naturally have heard of him, had he been alive. Then the burden of proving that he is alive will be shifted to the person who maintains that he was alive. The exact time of death of the person nonetheless is not a matter for presumption but of evidence and therefore the onus of proving that the death took 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. See *Lal Chand Marwari v. Mahant Ramrup* Cir AIR 1926 P.C. 9, *Mary v. Zacharia and Co. Ltd.* 1967 KLT 1082. A Full Bench of this Court in [Appula Vadhyar](#)

[Narayana Vadhyar Vs. Venkateswara Vadhyar and Others](#), had occasion to consider the very same question. The Full Bench after reviewing the case law on the subject has observed thus.

The date of death has therefore to be proved as any other fact by the person on whom the burden lies to establish the said death. The exact time of death is not a matter of presumption.

The latest decision of this Court in *Bhargavi Amma v. Bhaskara Pillai* 1988 (2) KLT 537 no doubt lend support to the argument of the counsel for the Petitioners that the date of death of the person whose whereabouts were not known to any for a period of more than seven years, is a matter for presumption. This Court has held as follows:

Both the presumptions under Sections 107 and 108 are only rebuttable. These two sections only deal with burden of proof and the consequent presumptions arising out of the discharge of that burden which the opposite party is free to rebut by adducing satisfactory evidence. Anyhow, the presumption u/s 108 regarding death could only be as on the date of suit in the absence of evidence regarding death on any particular date.

In the light of the above Full Bench ruling as also the ruling of the Privy Council, I am of the view that the latest decision of this Court shall confine to the facts of that case. Whatever that be the case on hand, in my view, requires to be decided in the light of the principles enunciated by the Division Bench in *Mary's case* 1967 KLT 1082 and also the Full Bench following the Privy Council ruling. See also *T.R. Rathnam v. K. Varadarajulu* AIR 1970 A.P. 240 and [Smt. Narbada and Another Vs. Ram Dayal](#), .

8. Reverting to the real question involved in the case. Under the circumstances who (whether the Plaintiffs or the Defendant) shall prove as to when exactly Mathew Joseph died? It is the common case of the parties that Mathew Joseph was last seen alive in May 1979 and thereafter his whereabouts were not known to any one. That means Mathew Joseph might have died at any time after May 1979 and since he was seen alive in May 1979, to my mind, it is for the Petitioners/Plaintiffs who allege that he was alive on a subsequent date within seven years of May 1979, to adduce proof in support of the said case. In other words it is for the Plaintiffs to prove that Mathew Joseph died only after the passing of the decree. To put it differently, the burden to prove the fact of death of Mathew Joseph is on the Petitioners-Plaintiffs. Have the decree holders discharged that burden is the further question that requires an answer. No evidence to prove the actual date of death of Mathew Joseph however has been let in either by the Petitioners-Plaintiffs or by the Defendant. Both sides in fact have only pressed into service the presumptions available under Sections 107 and 108.

9. From the discussion above it is clear that the Petitioners have not proved the fact, they asserted namely that Mathew Joseph died only after the passing of the decree. Unless that fact is proved or established, the presumption would entitle the Respondent to sustain his plea that the decree is incapable of execution. The court below therefore has rightly observed that "the presumption of death available in this case is not rebutted and as such the decree holders are not entitled to execute the decree".

C.R.P. fails. Accordingly the same is dismissed. No costs.