

(2002) 01 CAL CK 0029

Calcutta High Court

Case No: C.W.J.O.S.W.P. No. 2528 of 2001

Narayan Nayak

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision: Jan. 7, 2002**Acts Referred:**

- Evidence Act, 1872 - Section 108

Citation: (2002) 3 LLJ 1013**Hon'ble Judges:** D.K. Seth, J**Bench:** Single Bench**Advocate:** Madhumita Datta and Bijoy Kumar, for the Appellant; D.K. Kundu and Souma Ghosh, for the Respondent

Judgement

D.K. Seth, J.

It is alleged that the father of the petitioner has been missing since July, 1992. F.I.R. was lodged before the appropriate Police Authority. Newspaper publications were also made. In the meantime, more than 7 years have passed. The petitioner had applied for appointment on compassionate ground presuming death of his father.

2. The Respondent-Bank by its letter dated February 1, 2001 asked the petitioner to furnish some documents including a copy of the decree of the competent Court declaring Civil Death of the employee. The petitioner had furnished all the documents except the decree of a competent Court declaring "Civil Death" of the employee.

3. It is now contended by the learned Counsel appearing on behalf of the petitioner that the Respondent-Authority cannot insist upon a decree of a competent Court declaring "Civil Death" of the employee. She relied on a decision of the Andhra Pradesh High Court in the case of [Chief Engineer, Central Zone, Andhra Pradesh State Electricity Board, Vijaywada and Others Vs. K. Naga Hema](#), in support of her contention.

4. The learned counsel for the Respondent - State Bank of India had pointed out that the retiral benefits payable to the deceased father of the petitioner have since been paid. She also prays that unless a copy of the decree of the competent Court declaring "Civil Death" of the employee is furnished, it is not possible for the Bank to presume the employee as dead.

5. The learned counsel for the Respondent - State Bank of India insists that the case of the petitioner will be considered within 3 months from the date of furnishing a copy of the decree of the competent Court declaring "Civil Death" of the employee, to the Bank.

6. The learned counsel appearing for the respondent No. 4, however, took a neutral stand.

7. After hearing the respective Counsel appearing for the parties, it appears that the father of the petitioner is alleged to have been missing since 1992. On the expiry of 7 years from the date of such missing, legal death is presumed for all purposes.

8. In the decision in the case of K. Naga Hema (supra) it was so held by a Division Bench of Andhra Pradesh High Court in fact, under the provisions of Section 108 of the Evidence Act, death is presumed when a person has not been heard of for 7 years by those who would naturally have heard him if he had been alive. Therefore, having regard to the legal proposition, particularly when the Bank had already accepted the legal death by its conduct viz. by the payment of retiral benefits to the heirs of the missing employee, the death is already presumed by the Bank.

9. The rule in Section 108 of the Evidence Act supersedes the time of presumption provided in the Hindu Law as well as Hanafi Law which are 12 years and 30 years respectively; (Penduri v. Jaladhi) 43 MLJ 725. It is a rule of presumption. By reason of the language applied in Section 108 of the Evidence Act, the burden to prove that such person is alive, lies on the person who affirms it, despite the person having not been heard of for 7 years by persons who would have heard of him if he were alive. The presumption of civil death or fictional death by reason of Section 108 of Evidence Act tantamounts to physical death in the eye of law. On this proposition I am supported by [Parikhit Muduli and Others Vs. Champa Dei and Others](#), . Thus the presumption is a rule of evidence. By fiction the death is presumed in such circumstances unless otherwise proved by him who controverts it. Therefore there cannot be any question of obtaining a decree of declaration of civil death by the near relatives who have not heard of him. If some one insists that he is not dead then it is he who has to prove it. In as much as the burden lies on the person who asserts that affirmative; (AIR 1944 100 (Privy Council)). Therefore no suit lies for a declaration that a person not having been heard of for 7 years was deemed to be dead, unless the suitor seeks to establish that he is entitled to any legal character or to any right as to any property. Inasmuch as a suit for declaration can be maintained only within the scope and ambit of Section 34 of the Specific Relief Act, 1963. Section

34 does not sanction every form of declaration. It sanctions only a declaration that the plaintiff is entitled to a specific legal character or to any right as to property; *Deokali v. Kedarnath* (1912) 39 Cal 704. In other words the meaning of the section is that any person, who has a right to any legal character i.e. status, or to any property, may bring a declaratory action against any one who actually denies or has some interest on behalf of other to deny his title to such character or his right to any such property. In this case as observed earlier, by conduct the respondents have made payments of superannuation benefit presuming the father of the petitioner as dead. Thus the respondents are not denying the death. In order to obtain relief u/s 34 of the Specific Relief Act the plaintiff has to establish that the defendant has denied or is interested in denying the character or title of the plaintiff. The denial must be communicated to the plaintiff in order to give him cause of action. In this case no such communication of denial as such has been made with regard to any legal character or right to property by the respondents. The Bombay High Court had also taken the view that no such suit for declaration lies, in *Freemantle v. Freemantle* 52 Bom LR 641, though in a different context.

10. In the circumstances, the respondent-bank shall consider the petitioner's case in accordance with law, having regard to the particulars and other documents already furnished as asked for in its letter dated February 1, 2001, without the copy of the decree of the competent Court declaring "Civil death" of the employee, within a period of 3 months from the date of communication of this order and pass appropriate order.

11. But however, unless already produced, the petitioner shall produce or furnish a succession certificate to the Bank within a period of 3 years from the date he is given appointment, if any. In case it is not so furnished and unless the Bank extends the time for such furnishing of the succession certificate, it would be open to the Bank to take appropriate steps.

12. The writ-petition is thus disposed of.

13. There will be no order as to costs.

14. All parties concerned are to act on a xerox signed copy of this Dictated order on the usual undertaking.