

## **N. Jayalakshmi Ammal vs R. Gopala Pathar on 9 September, 1994**

**Equivalent citations: 1995 AIR 995, 1995 SCC SUPL. (1) 27, AIR 1995 SUPREME COURT 995, 1995 AIR SCW 983, (1994) 2 DMC 631, (1995) 1 HINDULR 332, (1995) 1 MAD LW 10, (1995) 1 MAD LJ 88, (1995) 21 MARRILJ 200, (1995) MATLR 1, (1994) 3 SCJ 572, (1995) 1 APLJ 71, (1994) 3 CURCC 117, 1995 SCC (SUPP) 1 27, (1995) 1 CIVLJ 40, (1994) 2 CURLJ(CCR) 783, (1994) 6 JT 19 (SC), 1995 (1) KLT SN 3 (SC)**

**Author: K.S. Paripoornan**

**Bench: K.S. Paripoornan, N Venkatachala**

PETITIONER:

N. JAYALAKSHMI AMMAL

Vs.

RESPONDENT:

R. GOPALA PATHAR

DATE OF JUDGMENT 09/09/1994

BENCH:

PARIPOORNAN, K.S. (J)

BENCH:

PARIPOORNAN, K.S. (J)

VENKATACHALA N. (J)

CITATION:

1995 AIR 995

1995 SCC Supl. (1) 27

JT 1994 (6) 19

1994 SCALE (4) 50

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by PARIPOORNAN, J.- Plaintiffs 2 and 8 in OS No. 42 of 1973, Subordinate Judge's Court, Kumbakonam, legal heirs of plaintiff 1 who died pending the suit,

are the appellants in this appeal. Defendants 1 and 2 in the suit are the respondents herein. The plaintiffs have preferred this appeal against the judgment of the Madras High Court in Second Appeal No. 1502 of 1979, dated 15-6-1984. The said judgment is reported in R. Gopala Pathar v. N. Jayalakshmi Ammal<sup>1</sup>.

2. In order to understand the nature of the controversy raised in this appeal a few facts may be stated. The property in dispute (in the suit) measures 10 feet east to west and 125 feet north to south in Big Street, Kumbakonam Town, Tamil Nadu. The suit property as well as a similar extent measuring in all 10 feet east to west and 250 feet north to south belonged to one Visalakshmi Ammal. On 1-2-1928, by Exhibit B-1 Visalakshmi Ammal sold the entirety of the property aforesaid to one Govindaswamy and his brother Srinivasa, who was then a minor and was represented by his mother as guardian. In the document, Srinivasa was described as an undivided minor son in the family. The acquisition purports to be on behalf of the joint family consisting of Govindaswamy and his brother Srinivasa, sons of one Kuthaperumal Vaidyar. On 29-8-1927, Govindaswamy was married to Kasambu Ammal (PW 2). They 1 AIR 1984 Mad 340: (1984) 97 Mad LW 313 : (1984) 16 Lawyer lived as husband and wife for about 3 years. They had no children. Thereafter Govindaswamy was not heard of. On 23-8-1970, by Exhibit A-4, (same as Exhibit A-11) Kasambu Ammal executed a sale deed in respect of the suit property in favour of one Nataraja lyer, plaintiff 1, for Rs 5000. On the basis of Exhibit A-4, Nataraja lyer instituted OS No. 42 of 1973, in Sub-Court, Kumbakonam, praying for a declaration of his title to the suit property and also for a declaration that he was entitled to claim certain amounts lying in court deposit to the credit of RCOP No. 11 of 1971. The said RCOP No. 11 of 1971 was a proceeding initiated by the first defendant (first respondent) against the second defendant the tenant (second respondent herein). The main contesting defendant is the first defendant, the first respondent herein. He contended that Kasambu Ammal was not the wife of Govindaswamy and had no interest in the suit property, and that the sale deed in favour of Nataraja lyer was bogus and would not operate to convey any title to the suit property. According to him, Govindaswamy and Srinivasa constituted members of a joint Hindu family and since Govindaswamy was not heard of for over 7 years, Srinivasa became the sole surviving coparcener who acquired title to the suit property by adverse possession, and as per Exhibit B-2 dated 10-9-1970, he had acquired title to the entirety of the suit property from Srinivasa and so the first plaintiff Nataraja lyer was not entitled to the reliefs prayed for in the suit. The second defendant in the suit was a tenant against whom an order of eviction was passed. Since a rival claim of title to the property in his occupation was put forth by the first defendant, he contended that he was an unnecessary party to the suit and so the suit may be dismissed against him. The learned Sub-Judge by his judgment dated 8-11-1976, found that Kasambu Ammal was the wife of Govindaswamy and was in possession of the undivided half share in the property, but the purported sale by her, of a definite portion i.e. front half of the property, was invalid. It was further held that Kasambu Ammal was in possession along with Srinivasa just 6-7 years prior to the filing of the suit and so the sale deed, Exhibit B-2 dated 10-9-1970 executed by Srinivasa in favour of the first defendant, though true, was not valid as Srinivasa was not solely and absolutely, entitled to the property and had not perfected title to the property by adverse possession. It was further held that the sale deed, Exhibit A-4 by Kasambu Ammal to the first plaintiff Nataraja lyer was fraudulent and antedated and in the result the suit was dismissed. The first defendant filed an appeal, AS No. 182 of 1977 before the District Judge, West Thanjavur and contended that as per Exhibit B-2, he had

absolute title to the entire property and the court below was in error in not holding so. In the cross-objections, plaintiffs 2 to 8, legal heirs of the plaintiff1 contended that the trial court was in error in not decreeing the suit for half of the property which belonged admittedly to Govindaswamy and was sold by his wife Kasambu Ammal as per Exhibit A-4 to the first plaintiff on 23-8-1970. The learned District Judge of West Thanjavur, by judgment dated 16-9-1978, found that Kasambu Ammal was the wife of Govindaswamy, that the exact date of death of Govindaswamy was not known, that Srinivasa had not perfected title to the suit property either by ouster or by adverse possession, that Nataraja Iyer had acquired title to one-half of the property by Exhibit A-4, that the first defendant would also be entitled to an undivided half share in the property as per the sale deed executed by Srinivasa in his favour, Exhibit B-2, and it will be open to the parties to file a separate suit for partition of the suit property and also for apportioning the amounts lying to the credit of RCOP No. 11 of 1971. Accordingly, he passed a decree declaring that the plaintiffs 2 to 7 as well as the first defendant are each entitled to an undivided half share in the entire house property and to half of the amount lying in court deposit to the credit of RCOP No. 11 of 1971. The appeal as well as the memorandum of cross-objection were partly allowed. The first defendant carried the matter by way of second appeal before the High Court, Second Appeal No. 1502 of 1979. The learned Single Judge of the Madras High Court after referring to the relevant findings of the courts below and the law on the point, held as follows: (i) Govindaswamy and Srinivasa constituted members of an undivided Hindu family and acquired the entirety of the property as per Exhibit B-1 sale deed; (ii) There was no division of the said property; (iii) Govindaswamy was not heard of from August 1930, and it could generally be presumed that by about 1937 Govindaswamy was dead; (iv) In the absence of proof that Govindaswamy died after coming into force of the Hindu Women's Rights to Property Act on 14-4-1937, his rights and interest in the joint family property devolved on Srinivasa, the surviving coparcener by survivorship and Srinivasa was thus entitled to the entire property and was competent to execute Exhibit B-2 dated 10-9-1970, to the first defendant; (v) In the absence of proof that Govindaswamy died after coming into force of the Hindu Women's Rights to Property Act on 14-4-1937, Kasambu Ammal was incompetent to execute the sale deed Exhibit A-4, and convey title to the first plaintiff, under whom plaintiffs 2 to 7 claimed their right; (vi) Since the first defendant obtained title to the entirety of the property as per Exhibit B-2, plaintiffs 2 to 7 had no title to the suit property and the suit OS No. 42 of 1973 should stand dismissed. It is from the aforesaid judgment and decree of the High Court, plaintiffs 2 to 7 have filed this appeal by special leave.

3. We heard counsel for the appellants Mr Rajendra Chowdhary and also counsel appearing for the respondents. Before us, counsel appearing in the case put forward the following arguments. Appellants' counsel submitted that Govindaswamy, husband of Kasambu Ammal was not heard of ever since August 1930. The Hindu Women's Rights to Property Act came into force on 14-4-1937. The suit was filed in 1973, nearly 43 years after Govindaswamy was last heard of. In such circumstances, Govindaswamy should be presumed to be dead. Since Govindaswamy was not heard of for more than 7 years by Kasambu Ammal and others who would have naturally heard of him if he had been alive, under Section 108 of the Evidence Act, he should be presumed to have died long ago and at any rate, long before Exhibit A-4 (A- 11) sale deed was executed by Kasambu Ammal to the first plaintiff. The courts below were in error in not giving effect to the presumption flowing from Section 108 of the Indian Evidence Act and in decreeing the plaintiffs' claim to the suit property and to the amount of deposit in the rent control proceedings. On the other hand, counsel for the

respondents contended that Govindaswamy was not heard of for more than 7 years by persons who would have naturally heard of him if he had been alive, and there is a presumption that Govindaswamy is dead but this presumption extends no further. It cannot be presumed that he died on any particular date. The date on which Govindaswamy died is a crucial fact in this case and is a matter for proof. In this case, there is no proof regarding the date of death of Govindaswamy. It is only by the provisions of Hindu Women's Rights to Property Act, Kasambu Ammal could get any right. The said Act came into force on 14-4-1937, within a period of 7 years when Govindaswamy was last heard of. There is no proof in this case to show that Govindaswamy died on or after 14-4-1937. In the absence of the proof as to when Govindaswamy died, it cannot be presumed nor can the plaintiffs contend, that Govindaswamy must be deemed to have died on or after 14-4-1937 when the Hindu Women's Rights to Property Act came into force and Kasambu Ammal became entitled to an undivided (half) interest in the property. On the other hand, on the death of Govindaswamy, the sole surviving coparcener Srinivasa became entitled to the property by survivorship and he was entitled to deal with the entire property and to execute the sale deed dated 10-9-1970 in favour of the first defendant. The first defendant became entitled to the entirety of the property as he had purchased the property from the sole survivor Srinivasa. Thus the entire controversy centres round the applicability and the extent and scope of Section 108 of the Evidence Act, to the instant case.

4. Section 107 of the Indian Evidence Act deals with presumption of continuation of life and Section 108 deals with the presumption of death. Sections 107 and 108 are to the following effect:

"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."

The principle discernible from a combined effect of the above two statutory provisions has been summarised in the book, Sir John Woodroffe and Amir Ali's Law of Evidence, 15th Edn. (1991) at pages 672-673 thus:

"The principle of Section 107 is that when once a state of things is shown to exist, there is in law a presumption of its continuance for a period for which such state of things ordinarily lasts. This section is merely a deduction from this presumption. If a person is shown to have been alive within thirty years of the date on which the question whether he is alive or dead arises, there is a presumption of his being alive, and the burden of proving that he is dead lies on him who asserts that he is dead. But this presumption is rebutted, if it is shown that he has not been heard of for seven years by those who if he had been alive, would naturally have heard of him; and, on

such proof being given the burden of proving that he is still alive, is, under Section 108, upon those who assert that he is alive. The presumption under Section 108 is as to the fact of death at the time the question was raised and not at any particular antecedent time. There is no presumption also to the cause and circumstances of the death. Section 107 deals with the presumption of continuation of life, whereas Section 108 deals with the presumption of death. Section 108 enacts a proviso to Section 107 by specifying that when a person was continuously absent for seven years and he was not heard by his friends and neighbours he may be presumed to have died and the burden of proving that he is alive shifts on the person that he is alive. The presumption of continuance of life under Section 107 ceases at the expiration of seven years from the period when the person in question was last heard of. The presumption under Section 107 will apply when the question is whether a person was alive or dead and not where the question is whether the person was alive or dead on a particular date."

5. The Judicial Committee of the Privy Council, more than 60 years ago, in the leading case *Lal Chand Marwari v. Mahant Ramrup Gir*<sup>2</sup> stated the law authoritatively thus:

"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. Now, upon this question there is, their Lordship are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England (*Rango Balaji v .*

*Mudiyappa*) and searching for an explanation of this very persistent heresy, their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from *In re Phene's Trust*<sup>3</sup> run as follows :

'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 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.' 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'."

(emphasis supplied)

6. In M. Monir's Principles and Digest of the Law of Evidence, Vol. 2, 7th Edn. at page 1145, the law on the point is succinctly summarised thus:

"The only presumption enjoined by Section 108 of the Evidence Act being that a person who has not been heard of for seven years or more is dead at the time the question is raised, there can be no presumption of his being dead or alive at any particular time of the period for which he has not been heard of. There is neither any presumption of his being alive for a 2 AIR 1926 PC 9: 30 CWN 721 : 28 Bom LR 855:

53 IA 24 3 LR 5 Ch 139: 39 LJ Ch 316: 18 WR 303: 22 LT period of seven years from the time he was last heard of; nor any presumption of his having died immediately after his disappearance, nor any presumption of his being alive or dead at any particular time antecedent to the suit or proceeding in which the question of his being dead or alive arises. The result, therefore, is that where nothing more is shown than that a person has not been heard of for seven years or more, the party, on whom the burden of proving him to be alive or dead at any particular time during the period he has not been heard of lies, will fail." (emphasis supplied)

7. Sarkar on Evidence, 14th Edn., at page 1438, has summarised the law after a detailed survey of the decisions of the various courts thus:

"If a person is not heard of for seven years there is a presumption of the fact of death at the expiration of seven years, but the exact time of death is not a matter of presumption but of evidence and the onus of proving that 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. There is no presumption that death took place at the close of seven years."

(emphasis supplied) Both the above authors have referred to the decision of the Privy Council aforesaid besides other decisions.

8. In Halsbury's Laws of England, 4th Edn., Vol. 17, page 85, paras 115 and 116 the law is stated thus:

"115. Presumptions of life and death.- There is generally no presumption of law by which the fact that a person was alive or dead on a given date can be established, but the question must be decided on the facts of the particular case.

Certain exceptions to this general rule are provided by statute, and, in addition, where there is no acceptable affirmative evidence that a person was alive at sometime during a continuous period of seven years or more and it is proved that there are persons who would be likely to have heard of him over that period, that those

persons have not heard of him, and that all due inquiries have been made appropriate to the circumstances, there arises a rebuttable presumption of law that he died sometime within that period.

116. Proof of life or death at a particular time.- He who asserts that a person was alive on a given date, or dead on that date, must prove the fact by evidence, since there is no presumption of continuance of life, and, generally, no presumption of death at a particular time. Where there is insufficient evidence in support of the fact alleged, the party bearing the burden of proof will fail. The question of whether a person was alive or dead at a given date will be decided on all the evidence available at the date of the hearing."

The decision for the Privy Council in Lal Chand Marwari case<sup>2</sup> has also been relied on and referred to in the above treatise.

9. It is unnecessary for us to advert to the various other decisions on the subject. A few decisions have been referred to by the learned Single Judge in his judgment. The textbooks referred to above have referred to the decisions of the various courts on the subject. The aforesaid decisions of the High Courts mainly rely on the decision of the Privy Council in Lal Chand Marwari case<sup>2</sup>. In one of them, Velayudhan Sarojini v. Sankaranarayanan Sivanandan<sup>4</sup> Koshi. C.J., agreeing with Joseph, J. has catalogued accurately in detail a large number of English and Indian decisions on the subject.

10. In the light of the above legal position, we are of the view that the burden of proof is on the plaintiffs to prove that Govindaswamy died after coming into force of the Hindu Women's Rights to Property Act on 14-4-1937, and that Kasambu Ammal obtained the undivided half right in the property as per the Hindu Women's Rights to Property Act. This crucial fact has not been proved by the plaintiffs. They solely relied on the presumption under Section 108 of the Evidence Act. As we stated earlier, there is no presumption that Govindaswamy died on any particular date or on the expiry of seven years from August 1930. His wife Kasambu Ammal was not shown to have inherited the undivided half share of Govindaswamy in the property. She was incompetent to convey any interest in the suit property as per Exhibit A-4 dated 23-8-1970. On the other hand, on the death of Govindaswamy, Srinivasa became entitled to the property by survivorship and he was competent to execute Exhibit B-2 dated 10-9-1970, to the first defendant who became entitled to the entirety of the property. The judgment and decree of the learned Single Judge of the Madras High Court is justified in law and no interference is called for.

11. We hold that this appeal is without merit. It is dismissed. But in the circumstances of the case, there shall be no order as to costs.