

Sanjay Kumar Vs. Hemant Kishore and Others

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Court : Allahabad

Decided On : Feb-24-1998

Reported in : 1998(3)AWC1746

Judge : O.P. Garg, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 151 - Order 1, Rule 10(2) - Order XXII; [Evidence Act, 1872](#) - Sections 107 and 108

Appeal No. : Civil Revision No. 63 of 1998

Appellant : Sanjay Kumar

Respondent : Hemant Kishore and Others

Advocate for Def. : Pramod Jain, Adv.

Advocate for Pet/Ap. : A.D. Prabhakar, Adv.

Judgement :

O.P. Garg, J.

1. This is an application in revision against the order dated 19.1.1998 passed by Sri R. H. Zaldi, Civil Judge (Senior Division), Meerut whereby impleadment applications moved by the revisionists in Original Suit No. 942 of 1986 have been rejected. Heard Sri A. D. Prabhakar and Sri Pramod Jain, learned counsel for the

parties.

2. Original Suit No. 942 of 1986 was instituted by Hemant Kishore and two others for the relief of partition of the properties as have been described in Schedule 'A' of the plaint and for possession over half of their share ; for permanent injunction restraining the defendants from alienating or transferring half share of the plaintiffs in the suit property and for rendition of accounts. Brij Raj Kishore and his son Vijay Kumar are defendant Nos. 1 and 2 in the suit. The suit has reached almost at the stage of its conclusion as arguments have been heard after recording the evidence of the parties and the case was reserved for judgment. It was at this stage that the present applicants, who are the wife, son and daughter of defendant Vijay Kumar moved applications for their impleadment under Order I, Rule 10 (2) read with Section 151 of the Code of Civil Procedure. It was alleged that the defendant No. 2, Vijay Kumar has not been heard of for the last more than 7 years and consequently, a legal presumption under Section 108 of the Evidence Act arises that he is dead. It is also alleged that the applicants being legal heirs of Vijay Kumar, are entitled to be substituted and in any case, they have their own independent rights in the disputed properties which undoubtedly are the ancestral properties, and, therefore, their impleadment in the suit as defendants is necessary with a view to decide it effectively.

3. Sri Brij Raj Kishore, defendant No. 1, who happens to be the grandfather/father-in-law of the applicants has opposed the impleadment of the applicants by filing a separate objection. He has asserted that Vijay Kumar was last seen alive five years ago, meaning thereby presumption under Section 108 of the Evidence Act cannot be raised about his death and that the application for substitution is highly belated and barred by time, inasmuch as, the applicants have instituted a separate Suit No. 7 of 1997 on 2.1.1997 for establishment of their rights in that ancestral property and they should have, in any case, moved an application for substitution under Order XXII, C.P.C. within 90 days of their having come to know of the death of Vijay Kumar. It was also stated that Vijay Kumar had earlier filed a written statement in which he had categorically asserted that he has no share in the disputed properties, which are sought to be partitioned ; had no concern, whatsoever with that and that he has unnecessarily been impleaded as party to

the suit and in view of these assertions/admission of Vijay Kumar. the applicants cannot make a case contrary to what Vijay Kumar had asserted.

4. At the outset, it may be pointed out that Vijay Kumar admittedly has not met with his physical death. A presumption of his death is sought to be raised in the light of the provision of Section 108 of Evidence Act, which provides as follows :

'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.'

Section 107 of the Evidence Act deals with the presumption of the continuance of life while Section 108 raises a presumption of death if the person has not been heard of for seven years. The effect of these two provisions in the Evidence Act is that the presumption of life prevails until displaced by the proof of actual death or proof of facts raising the presumption of death and. In the latter case presumption of death prevails till actual existence of life is proved. While Initially the presumption of life exists over the whole period of 30 years when the same is displaced the presumption of death exists over the whole period of 'unheard of. Any way, In view of categorical pronouncement of their Lordships of the Privy Council in Lal Chand Marwari v. Ramrup Gtr. AIR 1926 PC 9, there is no confusion as it has been held :

'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.'

5. Now the moot point for consideration is as to on which date, the death of Vijay Kumar is to be presumed as the presumption of civil death or fictional death under Section 108 of the Evidence Act tantamount. to physical death in the eyes of law for giving the benefits to the heirs/legal representatives and dependents of the

deceased. At what time within the period of seven years, a person has 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 seven years lies upon the person who claims a right to the establishment of which that fact is essential. Once the rule of presumption is invoked on the ground that a man has not been heard of for 7 years, the beneficiary or the claimant is entitled to ask for the relief on the footing that he is dead. In *Partkhtt Mudull and others v. Champa Devt and others* : AIR1967 Ori70 , it has been held that the presumption under Section 108 of the Evidence Act is available at the point of time when the party approaches the Court for necessary relief. There cannot be any presumption as to the actual date of death and this fact has to be proved like any other fact. In some cases, it was observed that there is also no presumption that on the close of 7 years, death has occurred. In 'this connection, a reference may be made to *Mukund Behera and others v. Subarna Begum and another* : AIR1962 Ori3 and *Rama Bhai v. Saraswati* AIR 1953 TC 114, in which it was held that where there is a dispute in a suit as to the date of death of a person not heard of for seven years. In the absence of any evidence of either side, the Court should draw a presumption that he was dead on the date of the suit. The same view has also been taken by the Calcutta High Court in a case in *Narki v. Lal Sahu*, 1910 ILR 37 Cal 103 and the Andhra Pradesh High Court In *Kottapall Venkateswarlu v. Kottapalll Capayya and others* AZR 1957 AP 380, in which it was ruled that death can 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. To the same effect are the observations made in *Life Insurance Corporation v. Shashi Ammal*. : [1956]29ITR683(Mad) and *Sarju Kairi and others v. Panchanand Sharma and others* AIR 1959 Assam 15.

6. In the Instant case, even this fact that Vijay Kumar has not been heard of for the last more than 7 years has been challenged by Brij Raj Kishore defendant No. 1 who is father of Vijay Kumar defendant No. 2. Brij Raj Kishore is the person who must have known about the whereabouts of his son Vijay Kumar and when he says that his son was seen alive about 5 years ago, the very basis on which the applicants claim for impleadment/substitution goes away. Therefore, during the lifetime of Vijay Kumar, applicants have no right to be substituted in his place by

invoking provision of Order XXII, C.P.C.

7. Now I take up the alternative case of the applicants that their impleadment is necessary in order to establish their own right in the disputed property which is sought to be partitioned. According to them, they have acquired their right in the property by birth and, therefore. In order to avoid multiplicity of the suit and to countervail the sham fight, between the contesting parties. It is necessary that the applicants are brought on record so that the entire controversy may be exposed and properly determined. Sri Pramod Jain, learned counsel for the opposite parties repelled this submission and pointed out that firstly the applicants have already filed a separate Original Suit No. 7 of 1997 for the establishment of their independent right, If any, and secondly, the applicants cannot go against the assertion/admission made by Vijay Kumar defendant No. 2 in his written statement that he has no share in the disputed properties and that he was unnecessarily impleaded as party in the suit. This submission of the learned counsel for the opposite parties is not without force. If the applicants have any right in the ancestral properties, which is the subject-matter of the present suit, they would be able to establish the same in the suit, which has been separately instituted by them.

8. After having heard learned counsel for the parties, I find that the impleadment applications were not bona fide. These applications were moved with a view to retard the progress of a suit which was Instituted more than a decade ago. Now that the suit was going to be finally decided, the applicants have come forward with certain allegations which on scrutiny, *prtma facte*, do not appear to be correct and on the basis of which, they cannot be impleaded as a party to the suit. This Court has Issued a mandamus to all the subordinate civil courts on 20.11.1997 in Civil Misc. Writ No. 25505 of 1997, *Stdhartha Kumar and others v. Upper Zila Judge, Ghazipur and others*, to take up all old cases in a phased manner and to decide them on priority basis. The subordinate Courts, in obedience of the direction/mandamus issued by this Court, are taking prompt steps for the disposal of the old cases. It appears that with a view to negate the efforts of the presiding officer to decide the old case, the applications for Impleadment in the present case, on behalf of the present applicants came to be moved. If such attempts of

litigants are encouraged, then the very purpose of issuing the mandamus by this Court in the aforesaid writ petition as well as in other connected writ petitions would be set at naught.

9. The impugned order passed by the Court below is quite elaborate and well reasoned. It does not suffer from any illegality or material irregularity. No prejudice is likely to be caused to the applicants. If they are not impleaded as parties/defendants to the suit as they have already instituted a separate suit for the establishment of their rights. It is, therefore, not a fit case in which the revisional power of this Court should be invoked, particularly keeping in view the circumstances in the wake of which applications for impleadment with an oblique motive came to be moved.

10. The revision application is devoid of any merits and substance, and is, therefore, dismissed. Costs easy.

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