

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

&

THE HONOURABLE MR. JUSTICE K. BABU

TUESDAY, THE 25TH DAY OF MAY 2021 / 4TH JYAISHTA, 1943

OP (CAT) NO. 210 OF 2017

AGAINST THE ORDER/JUDGMENT IN OA 958/2015 OF CENTRAL
ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH, ERNAKULAM

PETITIONERS/PETITIONERS:

- 1 P.VASANTHA
AGED 48 YEARS
MANIKANTA MANDIRAM, VILAVOORKAL, MALAYANKIL P.O,
- 2 MANIKANTAN
MANIKANTA MANDIRAM, VILAVOORKAL, MALAYANKIL PO.
- 3 JAYALEKSHMI
MANIKANTA MANDIRAM, VILAVOORKAL, MALAYANKIL PO.
BY ADVS.
SMT.K.P.SANTHI
SRI.RILGIN V.GEORGE

RESPONDENTS/RESPONDENTS:

- 1 SOUTHERN RAILWAY
REPRESENTED BY ITS GENERAL MANAGER,
SOUTHERN RAILWAY , CHENNAI.
- 2 THE CHIEF ACCOUNTS OFFICER
OFFICE OF THE FINANCIAL ADVISOR & CHIEF ACCOUNTS
OFFICER,
CHENNAI-3.
BY ADVS.
SC, RAILWAYS
SRI.S.RADHAKRISHNAN, SENIOR PANEL, RAILWAYS

THIS OP (CAT) HAVING BEEN FINALLY HEARD ON 10-03-2021, THE COURT
ON 25-05-2021 DELIVERED THE FOLLOWING:

O.P (CAT) No.210 of 2017

2

(C.R)

ALEXANDER THOMAS & K.BABU, JJ.

O.P(CAT) No.210 of 2017

*[Arising out of order dated 22-06-2017
in O.A No.958 of 2015 of CAT, Ekm Bench]*

Dated this the 25th day of May, 2021

JUDGMENT

K.BABU, J.

The challenge in this Original Petition, filed under Articles 226 & 227 of the Constitution of India, is against Ext.P4 order dated 22-06-2017 in O.A No.958/2015 of the Central Administrative Tribunal, Ernakulam Bench.

2. The prayers in the original petition are as follows:

- (I) *Set aside Ext.P4 order as illegal, unjust and unreasonable.*
- (ii) *Direct respondents to disburse the benefits due to the petitioners, being the legal heirs of a deceased Sreedharan, within a time frame to be fixed by this Honourable Court.*
- (iii) *Issue such other writ, direction or order as is deemed just and necessary in the facts and circumstances of the case.*

3. Heard Smt.K.P.Santhi, learned counsel appearing for the petitioners and Sri.S.Radhakrishnan, learned counsel appearing for the respondents.

4. The petitioners had filed O.A No.958/2015 with the following prayers:

O.P (CAT) No.210 of 2017

3

- (i) *Direct respondents to disburse the benefits due to the applicants, being the legal heirs of a deceased Sreedharan, within a time frame to be fixed by this Honourable Court.*
- (ii) *Issue such other writ, direction or order as is deemed just and necessary in the facts and circumstances of the case.*

5. By order dated 22-06-2017 the Tribunal dismissed the Original Application granting liberty to the petitioners to approach the Civil Court for appropriate declaration, if so advised.

6. The petitioners pleaded the following:- The petitioner No.1 is the legally wedded wife of Sreedharan, who was employed in the Indian Railways. Petitioners 2 & 3 are the issues born to petitioner No.1 in her wedlock with Sreedharan. Sreedharan obtained voluntary retirement from the Railways on 17-12-1987. He has been missing since 12-03-1998. A complaint under the caption "man missing" was lodged at the Malayinkeezhu Police Station on the basis of which FIR No.194/98 was registered. The petitioners are the legal heirs and successors of Sreedharan. The petitioner No.1 filed O.P No.246/2003 before the Family Court, Thiruvananthapuram impleading Sreedharan as the sole respondent and obtained a declaration, that she is his legally wedded wife, by way of Anx.A3 judgment. Sreedharan had married one Kamalamma on 06-09-1962 and two children were born in that wedlock. The

O.P (CAT) No.210 of 2017

4

marriage between Kamalamma and Sreedharan was dissolved by way of a decree of divorce passed by the Family Court, Thiruvananthapuram on 23-12-1992 in O.P No.512/92. The petitioners filed O.P No.681/2004, impleading Southern Railway and its Chief Accounts Officer as respondents, and prayed for releasing the retirement benefits of Sreedharan to them in the capacity as his legal heirs. By way of judgment dated 11-04-2007, the Family Court declined the reliefs prayed for by the petitioners holding that there was no valid marriage between petitioner No.1 and Sreedharan. The petitioners filed Mat.Appeal No.455/2007 before this Court. As per Anx.R2 judgment dated 02-07-2008 this Court granted liberty to the petitioners to approach the Civil Court for seeking necessary declarations. The judgment dated 02-07-2008 in Mat.Appeal No.455/2007 was reviewed in R.P No.313/2010 and this Court permitted the petitioners to approach Family Court instead of Civil Court. The petitioner No.1 had filed O.A No.400/2009 before the Tribunal and the same was closed on 18-02-2010 permitting her to approach the Tribunal afresh. The petitioner No.1 filed O.A No.829/2010, in which the Tribunal directed the petitioners to approach the Civil Court. The petitioners

O.P (CAT) No.210 of 2017

5

then filed O.P (Suc) No.7/2012 before the Sub Court, Trivandrum, which was disposed of by way of Anx.A6 judgment dated 20-08-2014, holding that the O.P was not maintainable in view of the pleadings of the petitioners that they were claiming benefits by way of testamentary succession. The petitioners again approached the Tribunal and prayed for disbursing the retirement benefits of Sreedharan to them.

7. The respondents set up the following pleadings:- The petitioner No.1 cannot claim the status of a legally wedded wife, since on 17-03-1984, the date on which Sreedharan is said to have married her, he had a wife living. That marriage was dissolved only in the year 1992. Annexure A2 Legal Heirship certificate and Anx.A3 judgment in O.P No.246/2003 were obtained by the petitioners without impleading Kamalamma, who is the legally wedded wife of Sreedharan. As per Anx.R2 judgment, in Mat.Appeal No.455/2007, the petitioners were directed to approach the Family Court after impleading Kamalamma for seeking necessary reliefs. Instead, the petitioners approached the Tribunal again by filing O.A No.400/2009 and thereafter again preferred O.A No.829/2010 wherein also the reliefs prayed for was to disburse the retiral

O.P (CAT) No.210 of 2017

6

benefits of Sreedharan to them. Original Application No.829/2010 was dismissed as per Anx.R4 order dated 30-01-2012 after a detailed consideration, directing the petitioners to approach the competent forum. The present O.A has been filed seeking the same reliefs, that too, without impleading Kamalamma and her children.

8. Sreedharan was serving as additional Divisional Accounts Officer in the Southern Railway at the time when he obtained voluntary retirement on 17-12-1987. It is pleaded that Sreedharan has been missing since 12-03-1998 and a man missing case has been registered in Malayinkeezhu Police Station as FIR No.194/98.

9. The petitioner No.1 claims that she is the legally wedded wife of Sreedharan and that the other petitioners are her issues in the wedlock with Sreedharan.

10. Based on the pleadings that Sreedharan is absent from his last and usual place of residence without having been heard from for a period of 7 years, the petitioners, invoking the rule of “presumption of death”, approached the Railways seeking the benefits due to them claiming that they are the legal heirs and successors of Sreedharan. The Railways insisted for a declaration by a competent court regarding the heirship of petitioners.

O.P (CAT) No.210 of 2017

7

11. Then, the petitioner No.1 approached the Family Court, Thiruvananthapuram and sought for a declaration that she is the legally wedded wife of Sreedharan, by filing O.P No.246/2003, impleading Sreedharan as the sole respondent. As per Anx.A3 judgment dated 20-01-2004 the Family Court declared that petitioner No.1 is the legally wedded wife of Sreedharan.

12. It is not in dispute that Sreedharan had married Kamalamma on 06-09-1962 and that two children were born in that wedlock. It is also not in dispute that the marriage between Kamalamma and Sreedharan was dissolved only on 23-12-1992 as per Anx.A4 judgment dated 23-12-1992 in O.P No.512/1992 of the Family Court, Thiruvananthapuram.

13. The petitioners filed O.P No.881/2004 impleading Southern Railway and its Chief Accounts Officers (respondents herein) as respondents before the Family Court, Thiruvananthapuram and prayed for directing them to disburse the family pension and other retiral benefits of Sreedharan. As per Anx.R1 judgment dated 11-04-2007 the Family Court dismissed O.P No.881/2004 holding that there could not be a valid marriage between Sreedharan and petitioner No.1 and hence they are not

O.P (CAT) No.210 of 2017

8

entitled to the reliefs prayed in the petition.

14. The petitioners brought the matter before this Court in Mat.Appeal No.455/2007. As per Anx.R2 judgment dated 02-07-2008 this Court dismissed the appeal, but granted liberty to the petitioners to approach the Civil Court.

15. The petitioners thereafter approached the Tribunal by filing O.A No.400/2009, seeking disbursal of retiral benefits, which was allowed to be withdrawn, and thereafter, they filed O.A No.829/2010 impleading the respondents herein and Kamalamma and her children. The Tribunal as per Anx.R4 judgment dismissed O.A No.829/2010 with the observation that the issues under consideration are matters purely of a civil nature and the remedy available to the petitioners is to approach Civil Court or Family Court seeking necessary reliefs after impleading Kamalamma and her two children. Subsequently, the petitioners filed O.P (Suc) No.7/2012 before the Sub Court, Thiruvananthapuram which dismissed the petition on the ground that the petition is not maintainable in view of the plea of testamentary succession.

16. The learned counsel for the petitioners submitted that as per Anx.A3 judgment in O.P No.246/2003, the Family Court has

O.P (CAT) No.210 of 2017

9

declared that the petitioner No.1 is the legally wedded wife of Sreedharan and hence no more declaration is required for seeking the reliefs prayed for in the O.A.

17. The learned counsel for the respondents, per contra, submitted that, Anx.A3 judgment in O.P No.246/2003 is not binding on Kamalamma who is the legally wedded wife of Sreedharan or the respondents. The learned counsel further submitted that as per Anx.R1 judgment in O.P No.881/2004 the Family Court, Thiruvananthapuram held that the petitioner No.1 cannot claim as the legally wedded wife of Sreedharan as, on the date on which her marriage was said to have taken place, Sreedharan had Kamalamma as his wife and that when the matter came up in Appeal before this Court in Mat. Appeal No.455/2007, the petitioners were given the liberty to approach the Family Court concerned for seeking necessary reliefs.

18. In the original petition No.246/2003 before the Family Court, Thiruvananthapuram, in which Anx.A3 judgment was passed, Sreedharan was the sole respondent. In the subsequent O.P No.881/2004, the Family Court, Thiruvananthapuram, by way of Anx.R1 judgment, held that the petitioner No.1 cannot claim to be

O.P (CAT) No.210 of 2017

10

the legally wedded wife of Sreedharan since, on the date on which the marriage was taken place, Sreedharan had his wife Kamalamma living. The Family Court held that there cannot be a valid marriage between Sreedharan and the petitioner No.1, as alleged, in view of the bar contained in Sec.5(i) of the Hindu Marriage Act.

19. The petitioners preferred Mat.Appeal No.455/2007 challenging Anx.R1 judgment before this Court. As per Anx.R2 judgment dated 02-07-2008, which was reviewed as per order dated 11-06-2010 in R.P No.313/2010, this Court dismissed the appeal without prejudice to the liberty of the petitioners to approach the Family Court by way of a proper suit or proceeding after impleading the said Kamalamma.

20. Now, the petitioners, relying on Ext.P5 certificate, contend that Sreedharan after dissolving his marital tie with Kamalamma married petitioner No.1 on 20-03-1994 as per customary rights. The petitioners also relied on Ext.P6 copy of ration card and Ext.P7 pension payment order to substantiate their contention.

21. In the various proceedings before the Tribunal and in Mat.Appeal No.455/2007 before this Court the petitioners were

given the liberty to approach the Civil Court or Family Court for seeking necessary reliefs by way of a proper suit or proceeding after impleading Kamalamma.

22. In view of the nature of contentions raised by the parties we are of the view that, for the effectual adjudication of the *lis*, the following issues are to be resolved.

- (a) Whether the petitioners established the facts and circumstances sufficient to raise a presumption that Sreedharan died.
- (b) Is petitioner No.1 the legally wedded wife of Sreedharan?
- (c) If assuming petitioner No.1 is not the legally wedded wife, whether petitioners 2 & 3 are the children of Sreedharan.
- (d) Even if petitioners 2 & 3 are illegitimate, are they not entitled to succeed to the estate of the deceased?

23. The “presumption of death” is a rule of evidence which determines the sufficiency of certain facts to discharge the burden of proof from the party on whom it is placed by the pleadings. The relevant provisions are dealt with in Secs.107 and 108 of the Indian Evidence Act.

“Sec.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.

Sec.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 .”

Both the presumptions under Secs.107 and 108 come into play after a suit is instituted. 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.

24. Where a person has not been heard of for seven years when a suit is instituted, Sec.108 comes into operation and raises a presumption that at the institution of the suit he was dead, but that no presumption arises as to the date of his death [vide Punjab v. Natha (A.I.R 1931 Lah. 582) and Kunju Kesavan v. M.M.Philip (A.I.R 1964 S.C. 164)].

25. What the Court may presume under Sec.108 is confined to the factum of death {vide Mohammad Sharif v. Bande Ali [8 A.L.J 1052 (F.B)]}.

26. Sufficient evidence is necessary to raise a presumption

about the death of a person under Sec.108 of the Indian Evidence Act [vide N.Jayalakshmi Ammal v. R.Gopala Pathar (A.I.R 1995 S.C 995)].

27. On 'the presumption of death' arising from absence the learned Authors, in Corpus Juris Secundum, Volume 25A, page No.550, Note 6, comment thus:

“The unexplained absence of a person from his last and usual place of residence without having been heard from for a period of seven years raises a presumption of his death, both at common law and under statutes declaratory of the common law. The reason for the presumption is that it has been found necessary, on grounds of public policy, that rights depending on life or death of persons long absent and unaccounted for, should not remain in abeyance indefinitely but should be settled according to some fixed rule. A presumption of death may also arise under statutes which are not necessarily declaratory of the common-law rule. Under some statutes, a period shorter than seven years is prescribed, at least according to some judicial declarations, for certain purposes. Statutes prescribing a particular rule as to proof of death in certain matters or proceedings do not preclude the application of the common-law presumption as to other matters or proceedings.

The presumption of death is effective for practically all legal purposes, including proceedings involving real property, and is available as a method of proof of death in cases where death is a jurisdictional fact that must be made to appear . The presumption must be applied with caution to prevent fraud and injustice.”

28. On the presumptions of life and death, in Halsbury's laws of England-Fourth Edition, Volume 17, paragraph No.115 the learned author writes thus:

“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 some time 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."

29. On the burden of proof, admissibility of evidence and the weight and sufficiency of evidence to establish the presumption of death, in Corpus Juris Secundum, Volume 25 A, page No.555, Note 6, the authors write thus:

***"The burden of proving** the facts giving rise to the presumption rests on the party invoking the presumptions.*

***Admissibility of evidence.** Any competent evidence of facts and circumstances which tend to support the presumption of death is admissible.*

***The weight and sufficiency** of the evidence necessary to establish the presumption of death is governed by the general rules as to the weight and sufficiency of evidence in civil actions, and in various cases the evidence has been held sufficient or insufficient to establish the presumption. It has been held that before death will be presumed, the evidence must remove any reasonable probability that the absentee is alive."*

30. The petitioners are at liberty to invoke the rule of "the presumption of death" in the manner known to law. In fact, it is necessary on the ground of public policy, that rights depending on life or death of a person (Sreedharan in the instant case) who is allegedly absent from his usual place of residence without having been heard from for a period of 7 years, should not remain unaccounted for indefinitely but should be settled in accordance with law. It is settled that the presumption of death is practically

available for all legal purposes including proceedings relating to property. It is to be noted that the burden of proving the facts giving rise to the presumption lies on the party invoking the presumption. The authorities referred to above suggest that the presumption, a rebuttable presumption of law that the person died sometime within the period of 7 years or more, must be applied with caution to prevent fraud and injustice. The classic example is British India's most iconic litigation- the ***Bhowal Sanyasi's*** case in which the Sanyasi, who was presumed dead, instituted a suit seeking a declaration that he was the Kumar (Prince) of Bhowal. The trial court declared that the plaintiff therein was Kumar Ramendra Narayan Roy (The Sanyasi) and that he was alive. The matter was brought up to the Privy Council which confirmed the findings of the trial court. [See ***Smt.Bibhabati Devi v. Kumar Ramendra Narayan Roy and others*** (MANU/PR/0094/1946)= 1946 UK PC 1; (1946 A.C.508, Privy Council). Hence it is significant that before death will be presumed, the evidence must remove any reasonable probability that the absentee is alive.

31. The question as to whether the petitioners established the facts and circumstances to draw the presumption of death shall be

an issue of fact in the trial.

32. Now coming to the marital status of petitioner No.1, as per Sec.7 (b) of the Family Courts Act 1984, a Family Court shall have and exercise the jurisdiction in respect of a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person.

33. For a declaration as to the legitimacy of petitioners 2 and 3 also as per Sec.7(e) of the Family Courts Act, a Family Court is the competent court.

34. The issues mentioned above are to be tried and resolved by a Family Court/Civil Court in a properly instituted suit or other proceeding.

35. The statutory Tribunals are clothed with power of adjudication of disputed questions. However the nature of such adjudication by those authorities is generally summary in nature and is circumscribed by the limit of statutory frame work for which those authorities are created by the statute concerned. The Civil Court on the other hand can decide factual questions as discussed above conclusively and such determination by those courts unless modified or nullified, would bind the parties finally. Every provision in the

Code of Civil Procedure is moulded in such a way as to make the determination of factual questions by the Civil Courts so elaborate and conclusive and not capable of being vexed again by any of the parties. In the scheme of the Code such decisions impliedly carry even a declaration as to the legal character of the right or liability or the estate in question.

36. While exercising the writ jurisdiction the constitutional courts are never expected to undertake such arduous task of sifting of the evidence relating to the questions posed above.

37. In a proceeding instituted under Articles 226 and 227 of the Constitution of India this Court has intrinsic limitations in resolving the issues relevant in the facts and circumstance of this case.

38. We are of the view that this Court cannot allow its constitutional jurisdiction to be used for deciding disputes for which remedies under the civil law are available.

39. We are of the considered view that the Tribunal has rightly held that the petitioners are not entitled to any reliefs in the original application. We hold that the impugned order passed by the Tribunal requires no interference at the hands of this court in

O.P (CAT) No.210 of 2017

18

exercise of the powers of the judicial review and superintendence.

40. We make it clear that the petitioners will have the liberty to approach the proper forum as stated above.

With these observations the Original Petition will stand dismissed.

Sd/-

ALEXANDER THOMAS, JUDGE

Sd/-

K.BABU, JUDGE

KAS

O.P (CAT) No.210 of 2017

19

APPENDIX OF OP (CAT) 210/2017

PETITIONER ANNEXURE

EXHIBIT P1	TRUE COPY OF THE O.A NO.958 OF 2015 FILED BEFORE THE CAT, ERNAKULAM.
ANNEXURE A1	TRUE COPY OF THE CERTIFICATE DATED 31-05-2002 ISSUED BY THE SUB INSPECTOR OF POLICE, MALAYINKEEZHU POLICE STATION
ANNEXURE A2	TRUE COPY OF THE SUCCESSION CERTIFICATE DATED 17-11-2000 ISSUED BY THE TAHSILDAR, NEYYATTINKARA
ANNEXURE A3	TRUE COPY OF THE JUDGMENT DATED 20-01-2004 IN O.P NO.246 OF 2003 OF THE FAMILY COURT, TRIVANDRUM
ANNEXURE A4	TRUE COPY OF THE JUDGMENT DATED 23-12-1992 IN O.P NO.512 OF 1992 OF THE FAMILY COURT, TRIVANDRUM
ANNEXURE A5	TRUE COPY OF THE WILL DATED 15-06-1992 EXECUTED BY SREEDHARAN
ANNEXURE A6	TRUE COPY OF THE JUDGMENT DATED 20-08-2014 IN S.O.P NO.7 OF 2012 OF THE PRINCIPAL SUBORDINATE JUDGE'S COURT, TRIVANDRUM
EXHIBIT P2	TRUE COPY OF THE REPLY STATEMENT FILED BY THE RESPONDENTS IN O.A.NO.958 OF 2015 OF THE ACT, ERNAKULAM
ANNEXURE R1	TRUE COPY OF THE JUDGMENT IN O.P NO.881/2004
ANNEXURE R2	TRUE COPY OF THE JUDGMENT IN M.A NO.455/2007
ANNEXURE R3	TRUE COPY OF THE JUDGMENT IN O.A NO.400/2009
ANNEXURE R4	TRUE COPY OF THE JUDGMENT IN O.A NO.829/2010
EXHIBIT P3	TRUE COPY OF THE ORDER IN OA NO.1885 OF 2013 (JANAKI DEVI V. THE GENERAL MANAGER) DATED 12/8/2014 OF THE CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

O.P (CAT) No.210 of 2017

20

EXHIBIT P4	TURE COPY OF THE ORDER IN OA NO. 958 OF 2015 DATED 22/6/2017 OF THE CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH.
EXHIBIT P5	TRUE COPY OF THE MARRIAGE CERTIFICATE ISSUED SREE SATHYA SAI ENTERPRISES, KGKP HALL, MANGALACKAL, KATTAKADA P.O.
EXHIBIT P6	TRUE COPY OF THE RELEVANT PAGE OF THE RATION CARD ISSUED ON 30.12.1995.
EXHIBIT P7	TRUE COPY OF THE PENSION PAYMENT ORDER ISSUED TO SRI.SREEDHARAN.