

High Court Form No. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT/CASE

District: UDALGURI

IN THE COURT OF CIVIL JUDGE, UDALGURI, ASSAM

PRESENT: NUR MUHAMMAD ABDULLAH AHMED, AJS

Monday, the 26<sup>th</sup> day of August, 2019

**TS-06/2017**

SMTI MEENA DEVI ----- Plaintiff.

-Vs-

1. DEPUTY COMMISSIONER, UDALGURI;
2. DISTRICT ELEMENTARY EDUCATION OFFICER, UDALGURI;
3. DEPUTY INSPECTOR OF SCHOOLS, UDALGURI ----- Principal Defendants.
4. SRI KHEM PRASAD SARMAH;
5. SMTI RATNA DEVI &
6. SRI KHAGEN PRASAD SARMAH ----- Proforma Defendants.

This Suit came in for final hearing on 16-08-2019 in presence of-

1. Mr J. K Brahma -----Ld Counsel for the Plaintiff.
2. Mr S. K Raha -----Ld Government Pleader.

And having stood for consideration to this day, the Court delivered the following judgment-

**J U D G M E N T**

1.This is a suit for a decree of declaration for holding that the husband of the plaintiff has died.

2.It is said '*Death is not opposite of life but a part of it*but when someone faces an uncertain position as to whether his/her near and dear one is dead or alive, having not heard of him/her for years together, this creates a situation where he/she finds it better to accept at least in legal parlance that there is no chance of finding such person alive, so as to attain some sort of peace of mind and incidental matters thereto. One

such situation is found in this case where the plaintiff's husband Ghanashyam Sarmah, who was a government employee of Education department and was serving as Head Pandit of Sindhrihora L.P School, was kidnapped by unknown miscreants from the School Premises on 07.11.2009. Subsequent to the incident, an FIR was lodged with the O.C, Udalguri PS by the father-in-law of the plaintiff i.e the father of the victim and accordingly Udalguri PS Case No-186/2009, u/s-365/34 IPC was registered. After the completion of investigation, the case ended in FR as true but the whereabouts of the plaintiff's husband could not be known. From the day of kidnapping i.e from 07.11.2009, no one have seen the plaintiff's husband alive. Hence the suit was filed by the plaintiff with a prayer for a decree of declaration of death of her husband.

**PLEA OF DEFENDANTS:**

3.The principal defendant No-1, 2 & 3 did not file written statement. *Proforma* defendant no-1, 2 & 3 have filed W.S by admitting all the stands taken by the plaintiff in her plaint.

**ISSUES FOR DETERMINATION:**

4. After perusing the plaint and the WS, following issues were framed-

- I) Is there any cause of action for filing this suit?
- II) Whether the suit is maintainable in its present form?
- III) Whether the suit is bad for non-joinder and mis-joinder of parties?
- IV) Whether the whereabouts of the plaintiff's husband Ghanashyam Sarmah is not known since 07.11.2009?
- V) Whether the plaintiff is entitled to decree/relief as prayed for or to any other relief?

5. The plaintiff Smti Meena Devi, in order to prove her case, adduced the evidence of herself as PW-1, Smti Ratna Devi as PW-2, Sri Narayan Prasda Parajuli as PW-3 and Sri Hebel Baglari as PW-4. The Plaintiff exhibited the Copy of Written Communication made by the S.P, Udalguri to D.I of Schools, Udalguri as Ext-1; Certified Copy of FIR dated 07.11.2009 relating to missing of plaintiff's husband as Ext-2; Police Report dated 07.01.2017 issued by OC, Udalguri PS as Ext-3 and Dependent Certificate of

Ghanashyam Sarmah issued by the Office of D.C, Udalguri as Ext-4. The defendants' side did not adduce evidence. I have also heard the arguments of both the sides at length.

DISCUSSION OF EVIDENCE, DECISION & REASONS THEREOF:

**ISSUE NO-I**

6. The expression 'cause of action' has a judicially settled meaning. Plainly speaking, 'cause of action' means and denotes all material facts on which a right is founded. In other words, cause of action is nothing but a bundle of facts which a party to a suit, claiming a relief under the law, is required to prove in order to have the suit decreed in his favour. In this case, the plaintiff has filed this suit claiming a declaration of death of her husband who has been missing since 07.11.2009. The police report (Ext-3) related to the incident of missing of the plaintiff's husband has been carefully perused. Considering the above, I am of the opinion that the Court has to adjudicate the matter and hence there is cause of action of the suit. So the issue in hand is decided in favour of the plaintiff.

**ISSUE NO-II:**

7. This issue relates to maintainability of the suit. It is found that the suit was filed within the period of limitation. After hearing both the sides and on perusal of the materials on record, I do not find any reason to question the maintainability of the suit on any other ground. Hence the issue in hand is decided in affirmative in favour of the plaintiff.

**ISSUE NO-III:**

8. Albeit the principal defendant no-1, 2 & 3 raised the issue of non-joinder of necessary party through a petition but they have subsequently failed to submit written statement. The *proforma* defendants did not raise the issue of non-joinder/mis-joinder of parties in their WS. Albeit the plaintiff has not made the Joint Director of Health Services, Udalguri as a party to this suit but the Joint Director of Health Services is not a necessary party in this suit as the plaintiff can be given relief in this suit even without the presence of Joint Director of Health Services, Udalguri as a party to this suit. In such circumstances, the Joint Director of Health Services, Udalguri is not a necessary party in this suit. Further I also do not find any other party which the plaintiff has joined

unnecessarily in this suit. Hence, the suit is not bad for non-joinder and mis-joinder of parties. The issue in hand is, accordingly, decided in negative.

**ISSUE NO-IV:**

9. It is undisputed that a declaration as to civil death is a declaration as to the status of a person. A declaration as to civil death can be granted by a civil court under section 34 of the Specific Relief Act 1963 read with section 9 of the Code of Civil Procedure 1908. The grant of decree of declaration to declare a civil death of a person is structured on the presumption envisaged in Section 108 of the Indian Evidence Act, 1872. The said provision propounds that if a person 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 upon the person who affirms it.

10. In effect section 108 of Evidence Act is an exception to the rule enacted in Section 107 of Evidence Act. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years, the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person whose life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the facts and circumstances under which the person may have died.

11. In **LIC of India –Vs- Anuradha** [(2004) 10 SCC 131, it was observed by the SC as follows:

"Neither Section 108 of the Evidence Act nor logic, reason or sense permits a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years' absence and being unheard of having elapsed before that time. The presumption stands un rebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence- factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death."

12. In the background of the above, let me now appreciate the germane evidences on record. The most vital witness is the plaintiff Smti Meena Devi (PW-1), who is the husband of Ghanashyam Sarmah, who is allegedly missing since his abduction on 07.11.2009. PW-1 stated in her examination-in-chief on affidavit that her husband Ghanashyam Sarmah was a government employee of Education department and he was serving as Head Pandit of Sindhrihora L.P School. PW-1 stated that on 07.11.2009 her husband was kidnapped by unknown miscreants from the school premises while he was on school duty. PW-1 further stated that on that day her father-in-law lodged an FIR with the Udalguri PS and accordingly Udalguri PS Case No-186/2009, u/s-365/34 IPC was registered. PW-1 further stated that in the year 2013, the Office of S.P Udalguri communicated an official letter *vide* Memo No-udl/Crime/03/2013/2627 dated 25/06/2013 with the Deputy Inspector of Schools, Udalguri which revealed that the

victim was kidnapped by the suspected Adivashi People's Army for ransom and presumed to be killed by miscreants. PW-1 further stated that from the date of kidnapping i.e from 07.11.2009 no one have seen her husband alive and her family members could not trace him out despite continuous search at suspected places. PW-1 exhibited the Copy of Written Communication made by the S.P, Udalguri to D.I of Schools, Udalguri as Ext-1; Certified Copy of FIR dated 07.11.2009 relating to missing of her husband as Ext-2; Police Report dated 07.01.2017 issued by OC, Udalguri PS as Ext-3 and Dependent Certificate of Ghanashyam Sarmah issued by the Office of D.C, Udalguri as Ext-4.

13. PW-2 Smti Ratna Devi, who is the mother of victim, corroborated the stand of PW-1 that her son Ghanashyam Sarmah was kidnapped from his school on 07.11.2009 and since then her son could not be found. PW-2 further stated that no one had seen her son since 07.11.2009. PW-3 corroborated the stand of PW-1 and PW-2. The defendants' side did not cross-examine any of the PWs and as such the stands of the aforesaid PWs have remained undisputed.

14. Now coming to the documentary evidences, it can be seen from Ext-1 (issued on 25.06.2013) that the S. P, Udalguri communicated to the D.I of Schools, Udalguri about the whole incident in response to a letter from D.I of Schools, Udalguri. It is evident from Ext-1 that the investigating authority failed to trace out the plaintiff's husband and it was suspected that he might have been killed. But at that time the case was still under investigation. But police report dated 07.01.2017 (Ext-3) issued by the Officer-in-charge of Udalguri PS shows that on completion of investigation of the case (Udalguri PS case No-186/2009, u/s-365/34 IPC) which was registered after the lodging of an FIR on the kidnapping of the plaintiff's husband on 07/11/2009, the case has returned in FR (Udalguri PS FR No-179/2016) as true but there was insufficient evidences against the arrested accused persons and the victim could not be traced out. Further the Deputy Commissioner, Udalguri issued a dependent certificate (Ext-4) in the name of plaintiff Smti Meena Devi. It is seen from Ext-4 that plaintiff's husband Ghanashyam Sarmah who was kidnapped on 07/11/2009 has left behind his wife (i.e the plaintiff Smti Meena Devi), one son Sri Angsuman Sarmah and one daughter Anaina Devi.

15. From the aforesaid oral and documentary evidence on record, the factum of Ghanashyam Sarmah, husband of the plaintiff, being missing since 07.11.2009 is circumstantiated. Neither the investigating authority nor the relatives of Ghanashyam Sarmah have been able to gather an inkling about his whereabouts since 07.11.2009. The same is also evident from Ext-1 (Communication made by S.P, Udalguri to DI of Schools, Udalguri), Ext-3 (Police report dated 07.01.2017) as well as other materials on record. It is noteworthy that there is nothing on record to discredit the version of the plaintiff and her witnesses. The testimonies of the PWs have remained uncontroverted and especially so, when the same is not disputed by the defendants.

16. In the instant case, the relationship of the plaintiff with Ghanashyam Sarmah has not been disputed by the defendants. In the natural course of events, it can be reasonably expected that the wife of a person would hear from him. In the instant case, the plaintiff has proved on record that the said Ghanashyam Sarmah has not been heard of since 07.11.2009. The present suit has been instituted on 11.10.2017 and the unrebutted case of the plaintiff is that her husband is missing since 07.11.2009 and has not been heard of since then. Evidence on record gives ample proof to the effect that the plaintiff's husband has not been heard of for seven years prior to the institution of the suit. The defendants have not discharged the onus of affirming that the husband of the plaintiff is alive and in fact, it is not even their case that the plaintiff's husband is alive or has been heard of by the plaintiff or her family members after 07.11.2009. In these circumstances, a presumption as to the civil death of her husband has been raised by the plaintiff before this court. As stated earlier, this presumption has not been rebutted by the defendants and as such, the plaintiff is entitled to a declaration as to the civil death of her husband in as much as the plaintiff has been able to prove that the whereabouts of her husband Ghanashyam Sarmah is not known since 07.11.2009. Therefore, this issue stands decided in favour of the plaintiff and against the defendants.

**ISSUE NO-V:**

**RELIEF & O R D E R:**

17. On the basis of the decisions reached in the above issues, the suit of the plaintiff is decreed on contest without costs with following reliefs in favour of the Plaintiff:-

- I) A decree declaring that Ghanashyam Sarmah, the husband of the plaintiff, succumbed to civil death after his kidnapping/abduction on 07.11.2009;
- II) A decree declaring that the plaintiff and her children are entitled to all claims and benefits incidental to the death of Ghanashyam Sarmah during his service period as per law;
- III) A decree declaring that the competent authority is at liberty to issue death certificate to the plaintiff in respect of her husband Ghanashyam Sarmah, if so required by the plaintiff, w.e.f the date of this judgment i.e 26.08.2019 &
- IV) A decree declaring that all concerned would take note of the civil death of plaintiff's husband Ghanashyam Sarmah for all purposes.

18. Prepare decree accordingly within 15 days.

19. Given under my hand and seal of this Court on this 26<sup>th</sup> day of August, 2019.

(Nur Md Abdullah Ahmed)

Civil Judge, Udalguri



**APPENDIX**

1) Plaintiff's Witnesses:

- I) PW-1: Smti Meena Devi;
- II) PW-2 : Smti Ratna Devi;
- III) PW-3 : Sri Narayan Prasda Parajuli &
- IV) PW-4 : Sri Hebel Baglari.

2) Plaintiff's Exhibits:

- I) Ext-1: Copy of Written Communication made by the S.P, Udalguri to D.I of Schools, Udalguri;
- II) Ext-2: Certified Copy of FIR dated 07.11.2009 relating to missing of plaintiff's husband;
- III) Ext-3 : Police Report dated 07.01.2017 issued by OC, Udalguri PS;
- IV) Ext-4 : Dependent Certificate of Ghanshyam Sarmah issued by the Office of D.C, Udalguri.

3) Defendants' Witnesses-NIL.

4) Defendants' Exhibits-NIL

5) Court Witnesses/Exhibits- Nil.

(Nur Md Abdullah Ahmed)

Civil Judge, Udalguri