

Re Soo Ngak Hee
[2010] SGHC 256

Case Number : Originating Summons No 778 of 2010
Decision Date : 26 August 2010
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Lim Hui Min (Legal Aid Bureau) for the Applicant.
Parties : Re Soo Ngak Hee

Evidence

26 August 2010

Judith Prakash J:

Introduction

1 This matter came before me on the application of Mr Soo Ngak Hee (the "Applicant") for a declaration that his younger brother, Mr Soh Ngak Wee ("SNW") be presumed dead. The application was made on the basis that SNW had disappeared and had not been seen by any member of his family since April 2001. I granted the application and now wish to give the reasons for my decision.

Facts

2 The facts stated in this judgment are taken from the affidavits filed by the following members of SNW's family: his mother, Mdm Ong Ah Kiau, his sisters Ms Soh Geok Cheng and Ms Soh Moey Khia, and the Applicant himself.

3 SNW was born on 19 November 1953. After completing his education, he worked as a manual labourer. Prior to the year 2000, SNW was working in a shipyard and, for a while, he was living in rented accommodation with a friend. He was not married. Sometime in 2000, SNW suffered a stroke and fell and had trouble walking thereafter. As a result, he lost his job and did not manage to find another one. He then moved back to live with his parents. From then on, he was unemployed and was supported by his siblings.

4 A few months after losing his job, on 28 October 2000, SNW was admitted to the Institute of Mental Health by the police when he was found making a lot of noise in a public place. He was apparently stressed and depressed about a prospective change of residence. The Applicant took SNW out of the hospital three days later as the family felt that he would be better off at home. About two months later, SNW and his parents moved to Block 264, Jurong East Street 24, #04-521, Singapore ("the flat"). The flat is held in the joint names of Mdm Ong and SNW.

5 On 14 March 2001, Mdm Ong and SNW made joint wills. This was done at SNW's suggestion. In both wills, Ms Soh Geok Cheng was appointed sole Executrix and Trustee. In his will, SNW stated that upon his death, his share in the flat should be given to Mdm Ong but that if Mdm Ong should predecease him, then the flat should be given to Ms Soh Geok Cheng. Mdm Ong's will stated that upon her death, the flat should be given to SNW but if he should predecease her, then it should go to

Ms Soh Geok Cheng.

6 According to Mdm Ong, SNW left home on 14 April 2001 at about 7.30am and did not return that night or thereafter. Subsequent checks revealed that he had not taken any of his personal belongings with him, including his passport. He had with him only the clothes on his back, his IC and whatever little cash he then had in his wallet.

7 A week after SNW's disappearance, Mdm Ong contacted the Applicant and told him that SNW had been missing for a week. The Applicant began searching for SNW. Acting on a tip from two of SNW's friends, the Applicant visited the Jalan Bahar cemetery. SNW had a vegetable plot there which he tended daily. The Applicant did not find SNW at the cemetery although he noted that the latter's motorcycle had been abandoned there. The Applicant walked around the cemetery for a few hours but there was no trace of SNW.

8 SNW did not return home or contact any of his siblings over the next few weeks. On 24 May 2001, the Applicant made a police report about SNW having gone missing. The police refused to accept the report until they had confirmed that SNW was not in prison, in any hospital or the Institute of Mental Health. The police made immediate checks with these institutions and then informed the Applicant that SNW could not be located in any of them. Until today, the police have not been able to trace SNW.

9 In July 2007, the Applicant placed an advertisement in the Lian He Zao Bao newspaper in an attempt to trace SNW. There was no response to this advertisement. The Applicant also returned to the cemetery about seven years after SNW's disappearance. He found that the land had been cleared for redevelopment and the motorcycle had disappeared.

10 In his affidavit made in July 2010, the Applicant stated that there were no further avenues that he could pursue to search for SNW. None of the members of SNW's family had had any contact with SNW for the past nine years. They had absolutely no knowledge of his whereabouts.

11 The Applicant was of the view that it was abnormal for SNW to have ceased contact with his siblings and his parents (SNW's father died only in 2009). SNW had relied on his family for financial support and was close to Mdm Ong. There were no family quarrels and thus it was very strange that he had not contacted them in the previous nine years and had not enquired about Mdm Ong to whom he was close. This opinion was echoed by SNW's two sisters who both described him as being a quiet and home-loving person.

12 The Applicant explained the reason for the application. As Mdm Ong is now 84 years old, the Applicant wished to obtain an order for presumption of death so that in the event of her demise, the flat would not be left in limbo with SNW as the permanently absent owner of the flat.

13 On the above facts, the question that I had to answer was whether there was sufficient evidence for me to make an order that SNW be presumed to be dead.

The Evidence Act

14 There are two sections in the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act") which deal with the presumption of death, *viz*, ss 109 and 110. These provide:

Burden of proving death of person known to have been alive within 30 years

109. When the question is whether a man is alive or dead, and it is shown that he was alive within 30 years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving that person is alive who has not been heard of for 7 years

110. When the question is whether a man is alive or dead, and it is proved that he has not been heard of for 7 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.

15 In *Re Wong Sook Mun Christina* [2005] 3 SLR(R) 329; [2005] SGHC 100 ("*Christina Wong*"), the High Court held that s 110 is a proviso to s 109. Section 109 applies to impose the burden of proof on an applicant who asserts that a person is dead, if that person has been alive within the past 30 years (as in the present case). However, if such person has not been heard of for seven years by those who would naturally have heard of him, s 110 would then apply to shift the burden of proof back to any person who asserts that the person concerned is still alive. If there is no one interested in asserting that the person concerned is alive, however, s 110 can apply in order to establish the presumption of the fact of death, though not to establish the particular time of death: *Christina Wong* at [14] - [19]. *Christina Wong* followed the approach taken in the Malaysian case of *Re Osman bin Bachit* [1997] 4 MLJ 445 ("*Osman bin Bachit*").

16 Therefore, in a case where the alleged deceased has not been heard of for seven years by persons who would naturally have heard of him, an applicant for a declaration of death can rely on s 110 to invoke the presumption of death because the presumption of continuance of life which s 109 contains would have ended.

17 On a plain reading of s 110, there are two elements required to shift the burden of proof to one who asserts continuance of life:

- (a) The person must not have been heard of for seven years; and
- (b) The person must not have been heard of by those who would naturally have heard of him if he had been alive.

These elements were also referred to in *Christina Wong* and *Osman bin Bachit*. The question that arises is whether there is a third element, *ie*, that the applicant must show that sufficient steps have been taken to ascertain whether the person is alive. This requirement does not appear on the wording of s 110 but is a common law principle that was read into s 110 in *Christina Wong* (at [30]) to prevent the section being abused as "a device of convenience" where proof of a person's death by another means exists.

Are the requirements satisfied?

18 The first requirement that the alleged deceased must have not been heard of for seven years was clearly satisfied in this case: SNW had been missing for more than nine years.

19 The second requirement was that SNW should not have been heard of by those who would naturally have heard of him, if he had been alive. The category of "those who would naturally have heard of" the deceased if he had been alive would usually comprise persons related to the deceased

“by virtue of blood or marital ties: *Christina Wong* at [23]. In *Osman bin Bachit* (at 448) the court referred to the English case of *Doe d’France v Andrews* (1850) 15 QBD 756 and held that such persons would be “close relatives or neighbours”.

20 In the situation where the alleged deceased had an estranged relationship with his family such that he would want nothing to do with them, however, the family would not fall into the category of persons who would “naturally have heard of” him. Such was the case in *Christina Wong* where the judge found that there had been an “irreparable rent in the fabric of familial relations” (at [23]). There, the applicant’s father was totally estranged from his wife and children in Singapore and, from his conduct, appeared to want to have nothing more to do with them. Thus, the court held that the applicant and her family could not fall into the category of persons mentioned in s 110. That being the case, s 110 could not be used to assist the applicant in *Christina Wong*.

21 The circumstances here were different. I was satisfied that SNW had good relationship with his parents and siblings prior to his disappearance. He was especially close to his mother and was living with her. He was on good terms with the Applicant and his sisters and depended on them financially. There were no family quarrels prior to SNW’s disappearance. He was not married and did not have any girlfriends and was not close to his relatives outside the immediate family circle. I was satisfied that the evidence established, on a balance of probabilities, that if SNW was alive he would contact his siblings and parents. This was clearly a case where there were people who would naturally have heard of the alleged deceased if he had been alive, yet they had not heard of him for more than seven years. The second requirement was therefore established.

22 The next point was whether I should go on to consider if the Applicant had fulfilled the third requirement posited in *Christina Wong*, that of making sufficient enquiries to ascertain whether SNW was alive. This was a common law requirement as can be seen from the case of *Chard v Chard (Orse. Northcott), Haye, Winstanley, Lord and Norris* [1956] P 259 where Sachs J stated at 270 and 272:

I respectfully agree with Harman J.’s conclusion in *In re Watkins* [1953] 1 W.L.R. 1323 that, where no statute applies, there is no “magic” in the mere fact of a period of seven years elapsing without there being positive evidence of a person being alive. It is, generally speaking, a matter in each case of taking the facts as a whole and of balancing, as a jury would, the respective probabilities of life continuing and having ceased.

[...]

My view is thus that in matters where no statute lays down an applicable rule, the issue of whether a person is, or is not to be presumed dead, is generally speaking one of fact and not subject to a presumption of law.

To that there is an exception which can be assumed without affecting the present case. By virtue of a long sequence of judicial statements, which either assert or assume such a rule, it appears accepted that there is a convenient presumption of law applicable to certain cases of seven years’ absence where no statute applies. That presumption in its modern shape takes effect (without examining its terms too exactly) substantially as follows. Where as regards “A.B.” there is no acceptable affirmative evidence that he was alive at some time during a continuous period of seven years or more, then if it can be proved first, that there are persons who would be likely to have heard of him over that period, secondly that those persons have not heard of him, and thirdly that all due inquiries have been made appropriate to the circumstances, “A.B.” will be presumed to have died at some time within that period. (Such a presumption would, of course be one of law, and could not be one of fact, because there can hardly be a logical inference from

any particular set of facts that a man had not died within 2,555 days but had died within 2,560.)

23 In *Christina Wong*, Andrew Phang JC (as he then was) recognised that the third requirement was not statutorily imposed in Singapore but considered that it should be adhered to as a matter set down by common law:

30 In any event, however, it was clear to me that, on the facts of the present case, the applicant had not taken sufficient steps to ascertain whether or not her father was still alive. It is true that, on a literal construction of s 110 itself, it might be argued that that provision does not include this particular requirement. At common law, however, it appears clear that this is indeed a requirement [...] It appears to me that both logic and common sense (as well as the common law from which the present provision was in fact derived) suggest that such a requirement ought to be incorporated as part of s 110 itself, and this view appears to have been confirmed in the Malaysian context (see the Malaysian High Court decision of *Re Gun Soon Thin* [1997] 2 MLJ 351 at 359). Such an approach acknowledges that the operation of s 110 is not one-sided, so to speak. Indeed, an extreme example occurs where it is sought to invoke s 110 where another method for proving the death of a particular individual clearly exists. Such a use of s 110 as a device of convenience may in fact border on abuse and cannot be permitted, as the Singapore High Court decision of *Lim Ah Khee v Legal Representative of the Estate of Ong Koh Tee, deceased* [1994] 2 SLR 769 clearly illustrates.

24 With due respect, I do not find it necessary to add the third requirement as a compulsory requirement which has to be fulfilled before a court can hold that the burden of proving that an alleged deceased person is still alive has shifted to those asserting that fact. To me, it would all depend on the circumstances before the court as to whether it should require any particular applicant to fulfil the third requirement before applying the presumption. In *Christina Wong*, the second requirement of s 110 had not been fulfilled so it was not possible to invoke the aid of that section and the applicant had to in fact prove her father's death. In those circumstances, clearly all due and sufficient steps and inquiries needed to be made to establish that fact. To the extent that the judgment in *Christina Wong* implies that such inquiries are invariably necessary before s 110 can be invoked, I consider the holding to be *obiter*.

25 I was, in any case, satisfied that the Applicant here had made sufficient inquiries and taken sufficient steps to establish whether SNW was still alive. He did the following:

(a) When he knew that SNW had gone missing, he contacted the two friends he knew that SNW had, and asked them if they had been in touch with him, and if they knew where he could be. They replied that they had not heard from him, but suggested he search in Jalan Bahar cemetery, which was where SNW went regularly to tend his vegetable plot. Sometime in late April 2001/early May 2001, the Applicant searched the whole perimeter of the cemetery, to no avail. He only found SNW's motorcycle.

(b) The Applicant lodged a police report on SNW's disappearance on 24 May 2001. The police ran a check on their computer network to search for records of SNW in the hospitals, prisons and the Institute of Mental Health. Their check did not yield any positive results. The police have not been able to locate SNW to date.

(c) The Applicant placed a missing person advertisement in the Chinese daily newspaper, "Lianhe Zaobao", on 14 July 2007 but no responses were received.

(d) The Applicant also returned to the cemetery in 2008 to search for SNW but found the

motorcycle gone and the land cleared for redevelopment.

(e) An Internet search on the Google search engine did not give any positive hits.

26 I agreed with counsel's submission that the Applicant and his family had done all that could reasonably be expected to be done in this regard, given their knowledge of SNW's acquaintances, routine and habits. There were no other leads they could follow. The situation here was quite different from that in *Christina Wong* where the alleged deceased had emigrated to the United States and where the judge held that various efforts made to trace him in the United States were token efforts and insufficient.

27 I was also buttressed in my decision by the English case of *Bullock v Bullock* [1960] 1 WLR 975 where *no* efforts were made by the wife to look for the husband yet the court proceeded to make a declaration that the husband be presumed dead. In that case, the wife had gone to court and obtained a committal order against the husband in relation to a matrimonial dispute. The police were enlisted to search for the husband, and failed to find him. The court held that the applicant wife had made sufficient inquiries to find her husband by going to court and enlisting the police to find her husband, and that she could "be excused for not having any hope of succeeding where the police have failed" (*per* Collingwood J at 982). I would simply add that the sufficiency of the steps taken to locate an alleged deceased must always be a question of what is reasonable in the circumstances of the case having regard to the characteristics of the alleged deceased, the circumstances in which he disappeared and the circumstances relating to his relationships with friends and family.

Conclusion

28 The facts before me showed that SNW appeared depressed at the time of his disappearance. A year earlier, he had suffered a stroke which caused him difficulty in walking and to lose his job. He was unable to find another job and was forced to move back to live with his parents and to depend financially on his siblings. He had made a will about a month before he disappeared and it is possible that he was preparing for his death. In any event, his sudden disappearance from the home which he jointly owned, without taking any of his personal belongings or his passport and without any cause to leave, was inexplicable. He had no financial resources which would have allowed him to live on his own. Yet for nine years after his disappearance, nothing more was heard of him. It appeared to me, on a balance of probabilities, that he must have died sometime during that period.

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