

(2020) 11 CHH CK 0002
In the Chhattisgarh High Court
Case No : Second Appeal No. 103 Of 2009

Ganga Bai (Dead) And Ors	Vs	APPELLANT
Leela Bai widow And Ors		RESPONDENT

Date of Decision : 03-11-2020

Acts Referred:

Specific Relief Act, 1963 — Section 34
Code Of Civil Procedure 1908 — Section 100
Specific Relief Act, 1877 — Section 42
Evidence Act 1872 — Section 108

Citation : (2020) 11 CHH CK 0002

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Praveen Dhurandhar, Dr.Veena Nair, Manoj Paranjape

Final Decision : Dismissed

Judgement

1. Proceedings of this matter have been taken-up for final hearing through video conferencing.

2. This second appeal preferred by original plaintiff-Ganga Bai has been admitted for final hearing on 15.9.2020 by formulating the following

substantial question of law: -

Whether the first appellate Court is justified in holding that the declaration sought for regarding the civil death of Bhagwat cannot be

granted under Section 34 of the Specific Relief Act, 1963, by recording the finding which is perverse to the record?

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial

Court.)

3. Original plaintiff-Ganga Bai was wife of defendant No.1-Bhagwat (She died during the pendency of this second appeal). She filed a suit

on 25.10.99 pleading inter-alia that her husband Bhagwat is not known for last 23 years (since 1976) and therefore, decree be granted stating

that defendant No.1 has died civil death as he is not known for last 23 years and claimed decree of declaration simpliciter for declaration that

defendant No.1-Bhagwat has suffered civil death. Defendants No.4 to 6 filed their written statement refuting the plaint allegation pleading

inter-alia that defendant No.1-Bhagwat has been seen in the year 2002, as such, the suit is liable to be dismissed as bare suit for declaration

as claimed is not maintainable.

4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 6.2.2004

decreed the suit holding that since defendant No.1 has not been heard for several years, therefore, the plaintiff is entitled for decree that

defendant No.1 has died civil death since the date of institution of suit i.e. 25.10.99. Feeling aggrieved against the judgment and decree of the

trial Court, defendants No.4 to 6 preferred first appeal before the first appellate Court. The first appellate Court by the impugned judgment

and decree allowed the appeal holding that the plaintiff is not entitled for any such decree as claimed and granted by the trial Court in view

of the provisions contained in Section 34 of the Specific Relief Act, 1963 (hereinafter called as 'the Act of 1963') as none of the answering

defendants have denied any of the legal right of the plaintiff, as such, the suit as framed and filed is not maintainable under Section 34 of the

Act of 1963. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been

filed by the plaintiff (during pendency of this second appeal, original plaintiff-Ganga Bai has died and Malesh Kunwar claiming to be adopted

son of the plaintiff has been impleaded), in which substantial question of law has been formulated and which has been set-out in opening

paragraph of this judgment for sake of completeness.

5. Mr.Praveen Dhurandhar, learned counsel for legal representative of the appellant/plaintiff, would submit that the first appellate Court is

absolutely unjustified in setting aside the judgment and decree of the trial Court

holding that the suit as framed and filed is not grantable under

Section 34 of the Act of 1963 for decree of declaration. He would further submit that Section 34 of the Act of 1963 does sanction every

form of declaration, therefore, the first appellate Court is absolutely unjustified in holding that the plaintiff is not entitled for decree of

declaration as claimed, as such, the impugned judgment and decree deserves to be set aside by answering the substantial question of law in

favour of the plaintiff and against defendants No.4 to 6.

6. Mr. Manoj Paranjape, learned Amicus Curiae, would submit that Section 34 of the Act of 1963 does not sanction every form of

declaration. It sanctions only a declaration that the plaintiff is entitled to a specific legal character or to any right as to property. In the instant

case, according to the plaintiff, her husband Bhagwat/defendant NO.1 is already dead on the date of institution of the suit and therefore, no

one has denied his legal character or right to property, therefore, such a suit has rightly been held to be not maintainable by the first appellate

Court. He relied upon the judgment of the Bombay High Court in the matter of Zena Gladys Freemantle v. Herbert Charles Freemantle 1949

SCC OnLine Bombay 633 and further relied upon judgment by the Calcutta High Court in the matter of Narayan Nayak v. State Bank of

India and others 2002 SCC OnLine Calcutta 902.

Â I have heard learned counsel for legal representative of the appellant/plaintiff as well as Mr. Manoj Paranjape, learned Amicus and went

through the records with utmost circumspection.

Â The plaintiff has only filed a bare suit for declaration that since defendant No.1 (her husband) has not been heard for last 23 years (since

1976), therefore, decree be granted that he has already died and eventually that decree was also granted in her favour by the trial Court, but

the first appellate Court reversed such decree holding that such a decree cannot be granted in view of the provisions contained in Section 34

of the Act of 1963.

9 Section 34 of the Act of 1963 provides as under: -

â??34. Discretion of court as to declaration of status or right.â?"Any person entitled to any legal character, or to any right as to any

property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its

discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title,

omits to do so.

Explanation.â?"A trustee of property is a â??person interested to denyâ? a title adverse to the title of someone who is not in existence, and

for whom, if in existence, he would be a trustee.â??"

10. A focused perusal of the aforesaid provision would show that only that person can have the remedy of obtaining decree of declaration,

who is entitled to any legal character, or who has any right to any property. The question would be, what would be the meaning of â??legal

characterâ???

11. The Lahore High Court in the matter of Haji Abdul Karim v. Sarriya Begum Minor under the guardianship of Nur Mohammad AIR 1945

Lah 266 while dealing with Section 42 of the Specific Relief Act, 1877 which is equivalent to Section 34 of the Specific Relief Act, 1963,

held that the words â??legal characterâ? used in Section 42 are wide enough to include the status of a person. Similarly, in the matter of

Shanta Shamsher Jung Bahadur Rana v. Kamani Brothers Private Ltd. and others AIR 1959 Bom 201, the Bombay High Court has held

that 'legal character' as used in Section 42 of the Specific Relief Act, 1877 (pari materia to Section 34 of the Specific Relief Act, 1963) is

equivalent to legal status, and legal status is a legal right when it involves a peculiarity of the personality arising from anything unconnected

with the nature of the act itself which the person of inherence can enforce against the person of incidence. The Nagpur High Court also in

the matter of Dipchand Kundanmal Marwari and others v. Manakchand Multanmal Marwari and others AIR 1939 Nagpur 154, held that a

man's legal character is the same as his legal status.

12. As such, the plaintiff has neither claimed nor is entitled for any legal character within the meaning of Section 34 of the Specific Relief

Act, 1963.

13. Now, the question is, whether the plaintiff has claimed any right as to any property for getting a decree of declaration under Section 34

of the Specific Relief Act, 1963?

14. According to Salmond (Salmond on Jurisprudence, 12th Edition, page 217) "right" means,

Rights are concerned with interests, and indeed have been defined as interests protected by rules of right, that is by moral or legal rules ...?

5 According to Holland (The Elements of Jurisprudence 13th Edition, page 82), a right "is one man's capacity of influencing the acts of

another, by means, not of his own strength, but of the opinion or the force of society.

5 According to Salmond (page 218) "legal right" means,

A legal right, on the other hand, is an interest recognised and protected by a rule of law "an interest the violation of which would be a legal

wrong done to him whose interest it is, and respect for which is a legal duty".

17. According to Holland (Page 83):

A legal right is a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others".

Â Therefore, according to both Salmond and Holland, every interest or right which is recognised and protected by the State, i.e., by the laws

of the State, is a legal right and every such legal right involves a legal duty or obligation.

According to Salmond (page 229), every legal right has the following characteristics:

Â It is vested in a person who may be called the owner of the right, the subject of it, the person entitled, or the person of inherence.

Â It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of duty, or

as the person of incidence.

Â It obliges the person bound to an act or omission in favour of the person entitled. This is the content of the right.

Â The act or omission relates to some thing (in the widest sense of the word), which may be termed the object or the subject-matter of the

right.

Â Every legal right has a title, that is to say, certain facts or events, by reason of which the right has become vested in its owner.

(20) The question for consideration would be whether the plaintiff is entitled for declaration that her husband is dead as he has not been

heard for last 23 years?

21 In the matter of Zena Gladys Freemantle (supra), the Bombay High Court has considered the issue in which also declaration under

Section 42 of the Specific Relief Act, 1877, which is pari-materia to Section 34 of the Specific Relief Act, 1963, was sought that her husband

is dead, the Bombay High Court has held that it is not competent to the Court under Section 42 of the Specific Relief Act, 1877 to entertain a

suit by a wife for declaration that her husband not having been heard of for over seven years was to be deemed to be dead. It was further

held that Section 42 postulates the existence of a defendant who denies or is interested to deny the legal character claimed by the plaintiff. It

was observed as under:-

â??The first difficulty that is raised by the present plaint is that it is a suit for a declaration and it cannot be entertained unless it falls within

the scope of s. 42 of the Specific Relief Act. That section inter alia provides that any person entitled to any legal character may institute a

suit against any person denying or interested to deny his title to such character, for a declaration that he is so entitled. The declaration sought

in this suit is not a declaration of such a kind. The plaintiff does not claim to be entitled to any legal character nor can it be said that there is

any person denying or interested to deny such character, because the plaintiff herself states that the plaintiff believes that the defendant is

dead. Section 42, in my opinion, postulates the existence of a defendant who denies or is interested to deny the legal character. The

possibility of his existence is, in my opinion, not sufficient. Secondly, apart from any statutory provision such as is made in the Matrimonial

Causes Act, 1937, in England, I find it difficult to entertain a suit against a person who the plaintiff avers is dead and to proceed, as the

plaintiff must seek leave to proceed hereafter, to serve the defendant by substituted service. I am therefore of the opinion that a suit of this

nature is not competent.â??

(22) The judgment rendered by the Bombay High Court in the matter of Zena Gladys Preemantle (supra) was followed with approval by the

Calcutta High Court in the matter of Narayan Nayak (supra) by holding that under Section 34 of the Act of 1963 only declaration that the

plaintiff is entitled to a specific legal character or to any right as to property is granted and held as under:-

â??8. The rule in Section 108 of the Evidence Act supersedes the time of presumption provided in the Hindu Law as well as Hanafi Law

which are 12 years and 30 years respectively; (Penduri v. Jaladhi,) 43 MLJ (725). It is a rule of presumption. By reason of the language

applied in Section 108 of the Evidence Act, the burden to prove that such person is alive, lies on the person who affirms it, despite the person

having not been heard of for 7 years by persons who would have heard of him if he were alive. The presumption of civil death or fictional

death by reason of Section 108 of Evidence Act tantamounts to physical death in the eye of law. On this proposition I am supported by

Parikh v. Champa, AIR 1967 Orissa 70. Thus the presumption is a rule of evidence. By fiction the death is presumed in such circumstances

unless otherwise proved by him who controverts it. Therefore there cannot be any question of obtaining a decree of declaration of civil death

by the near relatives who have not heard of him. If some one insists that he is not dead then it is he who has to prove it. Inasmuch as the

burden lies on the person who asserts that affirmative; (Agha Mir v. Mir Mudassir, AIR 1944 PC 100). Therefore no suit lies for a

declaration that a person not having been heard of for 7 years was deemed to be dead, unless the suitor seeks to establish that he is entitled

to any legal character or to any right as to any property. Inasmuch as a suit for declaration can be maintained only within the scope and

ambit of Section 34 of the Specific Relief Act, 1963. Section 34 does not sanction every form of declaration. It sanctions only a declaration

that the plaintiff is entitled to a specific legal character or to any right as to property; Deokali v. Kedarnath, (1912) 39 Cal 704. In other

words the meaning of the section is that any person, who has a right to any legal character i.e. status, or to any property, may bring a

declaratory action against any one who actually denies or has some interest on behalf of other to deny his title to such character or his right

to any such property. In this case as observed earlier, by conduct the respondents have made payments of superannuation benefit presuming

the father of the petitioner as dead. Thus the respondents are not denying the death. In order to obtain relief under Section 34 of the Specific

Relief Act the plaintiff has to establish that the defendant has denied or is interested in denying the character or title of the plaintiff. The

denial must be communicated to the plaintiff in order to give him cause of action. In this case no such communication of denial as such has

been made with regard to any legal character or right to property by the respondents. The Bombay High Court had also taken the view that

no such suit for declaration lies, in *Freemantle v. Freemantle*, 52 Bom LR 641, though in a different context.â??

(23) At this stage, it would be appropriate to notice Section 108 of the Indian Evidence Act, 1872, which provides as under:-

â??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.â??

24. Section 108 of the Evidence Act is an exception to the rule enacted in Section 107. Section 108, subject to its applicability being attracted,

has the effect of shifting the burden of proof back on the person 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 person is dead, but there is no presumption as to the date or time of death. The presumption as to death by

reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised

on expiry of 6 years and 364 days or at any time short of it. (See *L.I.C. of India v. Anuradha* AIR 2004 SC 2070.)

25. Reverting to the facts of the present case in the light of principle of law laid down in the above-stated judgments (*supra*), it is quite vivid

that the the plaintiff in the instant suit does not claim to be entitled to any legal character nor has said that any person is denying or interested

to deny any such legal character. According to plaint averments, defendant No.1/ her husband-Bhagwat is dead as he has not been heard for

last 23 years and Section 34 of the Act of 1963 as held by the Bombay High Court in Zena Gladys Freemantle (supra) that the existence of

the defendant who denies or is interested to deny the legal character is necessary and in absence thereof, no declaration flows from Section

34 of the Act of 1963 as claimed by the plaintiff.

Following the principle of law laid down by the Bombay High Court in Zena Gladys Freemantle (supra) and further followed by the Calcutta

High Court in the matter of Narayan Nayak (supra), I am of the view that the first appellant Court is absolutely justified in holding that it is

not competent for the Court to entertain such a suit filed by a wife/plaintiff claiming declaration that her husband having not been heard for

last 23 years is dead, as such, the first appellate Court is absolutely justified in setting aside the judgment and decree of the trial Court holding

that no such declaration can be granted in a suit filed by a wife that her husband was dead. I do not find any merit in this second appeal and

substantial question of law is answering against the plaintiff and in favour of the defendants.

27. Accordingly, the second appeal deserves to be and is hereby dismissed. However, this will not bar the legal representative of the plaintiff

to proceed in accordance with law. Parties shall bear their own cost(s).

28. A appellate decree be drawn up accordingly.

29. This Court appreciates the valuable assistance rendered by Mr.Manoj Paranjape as well by Mr.Praveen Dhurandhar, learned counsel for

legal representative of the appellant/plaintiff.