

(1982) 09 GUJ CK 0013
In the Gujarat High Court

Vardhabhai Gordhanbhai

APPELLANT

Vs

Gangaben and Another

RESPONDENT

Date of Decision : 24-09-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 54
Evidence Act, 1872 — Section 107, 107, 108, 108

Citation : (1982) GLH 1006 : (1983) 1 GLR 359

Hon'ble Judges : S.L. Talati, J

Bench : Single Bench

Judgement

S.L. Talati, J.—The appellant is the original defendant No. 1 of Regular Civil Suit No. 128 of 1975 of the Court of the Civil Judge, (J.D.), Jambusar. Respondent No. 1 is the plaintiff and respondent No. 2 is defendant No. 2.

2. The facts which gave rise to this second appeal may be stated as under:

One Gordhanbhai had certain properties and he had 2 sons by name, Varadhbhai and Mohanbhai. Mohanbhai joined religious order. That Mohanbhai had 2 daughters, Gangaben and Nathiben. Nathiben, original defendant No. 2, transferred her share in favour of Gangaben on 20th of June 1976. Gangaben, therefore, filed a suit and she claimed partition of the suit property and also prayed for accounts. The learned Civil Judge, (J.D.), Jambusar, held that the plaintiff had 1/2 undivided share in lots "A and B" undivided share in lot "C" as described in the plaint. The learned Civil Judge passed a preliminary decree and appointed a Commissioner to effect partition in regard to the properties mentioned at lots "A and B" and so far as the property mentioned at lot "C" is concerned, the decree was ordered to be sent to the Collector, Bharuch for partition u/s 54 of the Civil Procedure Code. The learned Civil Judge also ordered for making an inquiry for mesne profits from 1970 till the possession was handed over of lot "C". Original defendant No. 1 filed Regular Civil Appeal No. 27 of 1975 in the Court of the District Judge at Bharuch. That appeal came to be dismissed. The judgment and decree of the trial Court were confirmed with one modification

that inquiry for mesne profit for property at Lot "C" was ordered to be made from the date of the suit. Thereafter defendant No. 1 filed the second appeal. At the time of admission of this appeal the following substantial questions of law are formulated by the Court:

1. In absence of any evidence to prove the date of death of the plaintiffs father who was unheard for several years what should be the presumption about the date of the death?

2. If the date of his death is presumed to be prior to 1956, whether the plaintiff as the daughter is entitled to inherit under the Mayukha Law his undivided interest in the joint family property?

3. Whether the transfer effected by defendant No. 2 in favour of the plaintiff was hit by Section 6 of the Transfer of Property Act?

3. In order to answer these 3 questions the most important point which is required to be decided is as to on what date Mohanbhai joined religious order. The date on which Mohanbhai joined religious order would be the date of his civil death and on that day the question of succession would arise. This question assumes importance because the Hindu Succession Act, 1956 came into existence on 17th of June 1956. That Act for the first time gave right of inheritance to daughters also. Now, therefore, if Mohanbhai joined religious order before 17-6-1956, the plaintiff would not get anything by inheritance. But if Mohanbhai joined religious order on or after 17-6-1956, the plaintiff would inherit the property left by Mohanbhai. Before we say anything in regard to the evidence it is necessary to state that the first appellate Court answered the question which he raised in the following manner:

(1) Whether Mohanbhai Gordhanbhai was not heard of for more than seven years next before the institution of the suit? If yes, what should be the presumption with respect to the date of death of Mohanbhai?

That question was answered as under:

(1) Yes. The presumption with respect to the date of death of Mohanbhai is the date of the suit.

4. The first appellate Court, therefore, presumed the date of death of Mohanbhai and according to that presumption the date of death was date of suit. The crux of the problems is whether this could be done under the law. Before we discuss the law on the point, the evidence disclosed that the plaintiff in her evidence at Ex. 37, stated that Mohanbhai had run away since 10 years and he was not heard of since 10 years. If this is accepted, Mohanbhai was not heard of since 15-7-1964 because the evidence of the plaintiff Gangaben was recorded on 15-7-1974. In her cross-examination she stated that she was 10 years old when her father left the house. Now she gave her age to be 30 years on 15-7-1974. Now if she was 10 years old when her father left the house 20 years elapsed and, therefore, Mohanbhai left the house on 15-7-1954. Defendant No. 1 Varadhabhai gave

evidence at Exh. 50. In his evidence he stated that Mohanbhai was serving at Dr. Jajubhai's place. According to him he served at Dr. Jajubhai upto 1948 and thereafter he started dispensary and he left the place in 1951. One Naginlal was examined on behalf the defendant at Ex. 124 and he also stated that Mohanbhai was working as compounder in Dr. Jajubhai Hospital and in the year 1951 he left the house. We do not desire to express any opinion in regard to the above evidence. Even if the evidence led by the defendant is discarded, the question before the Courts was as to whether the plaintiff established the date of death of Mohanbhai and whether it was possible to come to the conclusion that Mohanbhai joined religious order and met his civil death after 17-6-1956. Now for this purpose so far as Evidence Act is concerned, two sections are required to be read together and they are Sections 107 and 108. They are reproduced as under:

107. 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.

108. (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.

5. Now the evidence in led to show that Mohanbhai was serving as a compounder at Dr. Jajubhai Hospital. Thereafter he opened his own dispensary and after few years he left the place. He was thereafter not heard of by persons who would naturally have heard of him if he has been alive. Under these circumstances presumption could be raised that Mohanbhai expired. The error committed by the first appellate Court is that the presumption was raised in regard to the date of death of Mohanbhai and the first appellate Court raised the presumption that date of death of Mohanbhai could be presumed to be the date of the suit. To come to that conclusion the first appellate Court relied upon 2 cases. The first case is the case of Lal Chand Marwari v. Ramrup Gir and Anr. reported in 53 Indian Appeal (1925) at page 24. In that case what the learned Judges held was as under:

Under the Evidence Act, 1972, Section 108, when the Court has to determine the date of the death of a person who has not been heard of for a period of more than seven years, there is no presumption that he died at the end of the first seven years, or at any particular date.

The second case is the case of Vithabai Dattu Patar v. Malhar Shankar Kulkarni reported in 40 BLR 147. Relying on the P.C. case cited above the Bombay High Court held as under:

Where the Court has to determine the date of death of a person who has not been heard of for a period of more than seven years, there is no presumption that he died at the end of the first seven years, or at any particular date.

6. Now that therefore, the first appellate Court fell into error when it came to the conclusion that the presumption with respect to the date of death of Mohanbhai could be raised and that the date of death of Mohanbhai could be presumed to be the date of the suit. Such a presumption never arises u/s 108 of the Evidence Act. Now that therefore, the only presumption possible is that Mohanbhai died. No presumption could be raised in regard to the date of the death of Mohanbhai. Now that therefore, the date of death of Mohanbhai was required to be determined. No presumption could be raised in regard to the date of the death of Mohanbhai. It is an admitted position that there was no evidence to prove the date of death of Mohanbhai and whatever little evidence was led was so conflicting that no conclusions from that evidence was possible. Now that, therefore, the only thing that could be said is that the plaintiffs father was unheard of for several years and the first appellate Court committed an error when it raised presumption that the date of the suit should be presumed to be the date of death of Mohanbhai. As no presumption could be raised in regard to the date of death of Mohanbhai the first question raised must be answered as under:

Answer : In absence of any evidence to prove the date of death of the plaintiffs father who was unheard of for several years no presumption about the date of death of Mohanbhai could be made.

7. The second question in fact will not survive because no date of death of Mohanbhai could be presumed, the question whether it could be presumed that Mohanbhai died prior to 1956 would not arise. The question of inheriting the properties left by Mohanbhai by the plaintiff under the Mayukha Law would not arise the plaintiff established that Mohanbhai died on a particular date. The third question also does not survive because it was also dependent upon the finding of the first question. At this stage, we may also refer to a case of Appula Vadhyar Narayana Vadhyar Vs. Venkateswara Vadhyar and Others, . The Full Bench of the Kerala High Court held as under:

No presumption can be drawn u/s 107 and 108 as to whether a person was dead or alive on any particular date before the date of suit in which the question is raised. The date of death has, therefore, to be proved as any other fact by the person on whom the burden lies to establish the said death. There is nothing in the language of Section 106 for the view that if the date of death is not proved by any of the parties the early date on which the death could be presumed is the date on which the suit was filed.

8. Now that, therefore, I am of the clear opinion that the first appellate Court committed an error of law by presuming as date of death to be the date on which the suit was filed. This has resulted in miscarriage of justice. Under these circumstances this second appeal is allowed. The judgment and decree of the trial Court as modified by the first appellate Court are set aside and the suit of the plaintiff is dismissed. There will be no order as to costs throughout.