

HIGH COURT OF CHHATTISGARH, BILASPUR
Second Appeal No.103 of 2009

Ganga Bai (Dead) Through Legal Representative
 (Plaintiff)
 Mahesh Kanwar son of late Bhagwat, aged about 75
 years, R/o Village Changori, Tahsil and District Durg
 (CG)
 ----- Appellant

Versus

1. Smt. Leela Bai widow of Dhanesh Kunwar, aged about 59 years,
2. Balmukund son of Dhanesh Kanwar, aged about 29 years,
3. Govind Singh son of Dhanesh Kanwar, aged about 24 years,
 Respondents No.1 to 3 are the resident of village Changori, Post Thanaud, Tahsil and Distt. Durg (CG)
 (Defendants)
4. Bhagwat son of Nayan Singh Kanwar, aged about 84 years, resident of village Changori, Post Thanaud, Tahsil and Distt. Durg (CG)
5. Public at Large
6. State of Chhattisgarh, through the District Collector, Durg (CG)

----- Respondents

 For LR's of the Appellant / Plaintiff: -
 Mr. Praveen Dhurandhar, Advocate
 For Respondents No.1 to 3: -
 None present though served
 For Respondent No.4: -
 Not served
 For Respondent No.6: -
 Dr. Veena Nair, Dy. A.G.
 Mr. Manoj Paranjape, Advocate appears as Amicus Curiae.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

03/11/2020

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 Freemantle¹ and further relied upon judgment by the Calcutta High Court in the matter of Narayan Nayak v. State Bank of India and others².

7. 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.
8. 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: -

“34. Discretion of court as to declaration of status or right.—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.

1 1949 SCC OnLine Bombay 633

2 2002 SCC OnLine Calcutta 902

Explanation.—A trustee of property is a “person interested to deny” a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.”

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 “legal character”?
11. The Lahore High Court in the matter of Haji Abdul Karim v. Sarriya Begum Minor under the guardianship of Nur Mohammad³ 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 “legal character” 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 others⁴, 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

3 AIR 1945 Lah 266

4 AIR 1959 Bom 201

Court also in the matter of Dipchand Kundanmal Marwari and others v. Manakchand Multanmal Marwari and others⁵, 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 intrests, and indeed have been defined as interests protected by rules of right, that is by moral or legal rules ..."

15. 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."

16. 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".

18. 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.

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

1. 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.
2. 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.
3. It obliges the person bound to an act or omission in favour of the person entitled. This is the content of the right.
4. 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.
5. 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:-

“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."

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:-

"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 *Parikhit 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 Mudasar*, 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."

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

"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."

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**⁶.)

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.

26. 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.

Sd/-
(Sanjay K. Agrawal)
Judge

B/-

HIGH COURT OF CHHATTISGARH, BILASPUR**M.C.C.No.78 of 2021**

Ganga Bai (dead), Through: Legal Representative Malesh Kanwar (wrongly mentioned as Mahesh) Son of Late Bhagwat, aged about 75 years, R/o. Village Changori, Tahsil and District Durg (CG)

---Applicant***Versus***

1. Smt. Leela Bai widow of Dhanesh Kanwar, aged about 59 years,
2. Balmukund Son of Dhanesh Kanwar, aged about 29 years,
3. Govind Singh Son of Dhanesh Kanwar, aged about 24 years,
Respondent No.1 to 3 are the resident of Village Changori, Post Thanaud, Tahsil and District Durg (CG) (defendants)
4. Bhagwat Son of Nayan Singh Kanwar, aged about 84 years,
Resident of Village Changori, Post Thanaud, Tahsil and District Durg (CG)
5. Public at Large
6. State of Chhattisgarh, Through: District Collector, Durg (CG)

---Respondents

For Applicant : Mr. Praveen Dhurandhar, Advocate
For Respondent No.6/State : Mr. Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****12/2/2021**

1. The applicant has filed this MCC for correction in the judgment dated 03.11.2020.
2. In the judgment dated 03.11.2020, inadvertently instead of typing "Malesh Kanwar" in cause title, it has been typed as "Mahesh Kanwar". It be read as "**Malesh Kanwar**". Rest of the judgment shall remain intact.
3. The MCC is accordingly disposed of.

Sd/-

(Sanjay K. Agrawal)
Judge