

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 19 of 2023
FAT 176 of 2022

Smt. Saroj Gupta & Others
versus
Sanjay Kumar Gupta

For the Appellants : *Mr. Pradeep Kumar,*
Ms. Shreya Trivedi,
Mr. Abhishek Tiwari,
Ms. Suman Singh.

For the State of West Bengal : *Mr. Rupak Ghosh,*
Mr. Ratul Das.

Hearing is concluded on : *17th January, 2023.*

Judgment On : **9th February, 2023.**

Partha Sarathi Chatterjee, J.

1. The present appeal has been preferred challenging the judgment and decree dated 20th June, 2022 passed by the learned Judge, III Bench, City Civil Court, Calcutta in Title Suit no. 981 of 2017 (Smt. Saroj Gupta & Ors. -vs- Sanjay Kumar Gupta) whereby the learned Court below dismissed a suit preferred by the appellants/plaintiffs seeking a declaration as regards the death of the husband of

the plaintiff no. 1 and the father of the plaintiff nos. 2, 3, 4, 5 & 6, who has not been heard of for more than 7 years by persons, who would have heard of him if he had been alive. In the impugned judgment and decree, it was, however observed that *'the plaintiffs, if so advised, are at liberty to file a fresh Suit, seeking such declaration, by incorporating or adding necessary parties therein'*.

2. Capsulated form of facts giving rise to this appeal is as follows :

- i. That the plaintiffs being the legal heirs of one Sanjay Kumar Gupta has filed one suit against Sanjay Kumar Gupta seeking primarily the following relief :

'a decree of declaration that the defendant being husband of the plaintiff No. 1 and father of the plaintiff Nos. 2, 3, 4, 5 & 6 since missing on and from 3.10.2009 and a declaration be given that since more than 7 years from the date of missing had passed the defendant had died under the provision of Section 108 of the Indian Evidence Act, 1872;'

- ii. Facts projected in the plaint, in brief, are that Sanjay Kumar Gupta (in short, Sanjay), at all material times, had carried on business at Kolkata and has his Savings Bank Account with Union Bank of India, Azamgarh Main Branch, Takia, Uttar Pradesh and also at Ezra Street Branch, Kolkata and a Public Provident Fund Account with State Bank of India, (Netaji Subhas Road) Branch, Kolkata and some insurance policies with LIC. During his life time, he acquired and was seized and possessed of various movable and immovable properties which are required to be

managed properly by the plaintiffs, who are the ultimate beneficiaries thereof;

- iii. It was claimed therein that Sanjay went missing from his residence located at 3, Amratala Street, Bharat Tea House, P.O. & P.S. – Burrabazar, Kolkata – 700 001 since 3.10.2009;
- iv. Plaintiffs lodged one General Diary *vide*. Burrabazar P.S.G.D.E. no. 302 dated 4.10.2009 which was forwarded to Missing person Squad at Lalbazar Police Headquarter, Lalbazar, Kolkata and the Joint Commissioner of Police, Crime Lalbazar, Kolkata issued an '*Interim Non-Traceability (Police Inquiry) Report*'. The fact of non-traceability and/or missing was published in various leading newspapers from time to time and the details including photograph were also telecast through Doordarshan Kendra, Kolkata. Lastly, on 20th June, 2017 i.e. after continuation of inquiry for more than 7(seven) years from the date of missing, office of the Commissioner of Police, Kolkata issued a Final Report *vide*. Memo. No. 1162/DD/MPS dated 20.6.2017 stating therein that '*all efforts to trace out the missing subject unfruitful and chance of tracing out the missing subject seems to be very remote*';
- v. It was submitted therein that Sanjay was sole bread earner of his family and in his absence, plaintiffs have plunged into penury and hence, they have been constrained to prefer the suit seeking such sort of declaration;

3. Record postulates that in corroboration of contention, the plaintiffs adduced oral testimony of plaintiff no. 1, who was examined as PW-1 and they had

tendered some documents which being admitted as evidence, were marked as Ext.1 to 4.

4. The primary issue on the basis of which the suit has been dismissed is that the appellants have failed to implead any person, who is denying or is interested to deny their legal character.

5. The intrinsic aspects relating to the burden of proof and the nature of evidence required for arriving at a conclusion with respect to the declaration of civil death of a person cannot be gone into in view of the admitted absence of any person denying the appellants' legal character. It is also true that no administrative authority has any jurisdiction to declare the death of a person in contemplation of the provisions of the Indian Evidence Act. Section 4(1) of West Bengal Escheats and Forfeitures Act, 2012 has enjoined a duty upon the Collector to send monthly reports to the competent authority of the occurrence of death of person having property within his district and Section 2(d) of that Act has defined the expression '*competent authority*' which means any person or authority of the Judicial Department of the State Government authorised to perform the functions of the competent authority under the Act. In view thereof and since an appeal is a continuation of the initial proceeding, we were of the opinion that instead of leaving the appellants to get entangled in the rigmarole of the procedural rigors and for the ends of justice, the *lis* may be adjudicated upon bringing on record the State. Accordingly, considering the application filed for impleading State of West Bengal represented by its Department of Law and Justice and upon hearing the learned advocate, who entered appearance on behalf of the State, we allowed such prayer by an order dated 10th January, 2023.

6. Placing reliance upon a unreported judgment of High Court of Judicature at Bombay, Nagpur Bench passed in Second Appeal no. 18 of 2016 (*Sau. Swati Abhay Deshmukh & Ors. Vs. Abhay Purushottam Deshmukh*), Mr. Kumar, learned advocate appearing for the appellants submitted that in that case also, a missing person, namely, Abhay Deshmukh was made party-defendant and the Court granted leave to add the State through Collector since the place of suing fell within the jurisdiction of the concerned Collector and declared that Abhay's death was civil death.

7. He added that in the given case, upon completion of investigation, the competent police authority had declared that Sanjay could not be traced out and chance of tracing him out is also very remote. More than thirteen (13) years have elapsed and the appellants have been facing unsurmountable inconvenience in managing the properties left by Sanjay. In view thereof, he prays that the Court without being hyper-technical may take a pragmatic view and declare that Sanjay has suffered civil death basing upon presumption incorporated in Section 108 of Indian Evidence Act, 1872.

8. *Per contra*, Mr. Das, learned advocate while representing the State submitted that there was no requirement to make the State as party to the suit and/or appeal and in his view, such declaration can be given even without any defendant and/or respondent. However, he assures that State does not want to stand in the way if this Court gives declaration that Sanjay has suffered civil death and further submits that the direction to implead the State, in the facts and circumstances of this case, may not be treated as a precedent.

9. It appears that the learned Court below proceeded on the basis that the appellants are not entitled to any legal character as envisaged under Section 34 of the Specific Relief Act, 1963 (in short, the said Act of 1963). Such a suit is not maintainable under Section 34 of the said Act of 1963, moreso when no person is denying and/or is interested to deny the appellants' title to such character or right. It was also observed that a '*dead*' or '*presumed-to-be dead*' or a '*missing person*' cannot be added as a party to any suit. The absence of denial from any defendant would bar the Court from granting any relief.

10. The presumption of death under Section 108 of the Evidence Act can only be raised in any proceeding in which question arises that any person is dead or alive and as such no suit can be filed on the basis of the said section. A suit for declaration of civil death is also not maintainable under Section 107 of the Evidence Act. The provisions therein do not create any substantial right in favour of the plaintiffs to institute the suit.

11. It is true that Section 34 of the said Act of 1963 is not a complete code for declaratory suits and such suit can be filed under Section 9 of the Code of Civil Procedure (in short, Code). It can thus be argued that suit for declaration of civil death *simpliciter* is maintainable under Section 9 of Code. However, a question arises as to whether one has a civil right to declare any other's death.

12. In our opinion, the Civil Court acting under Section 9 of the Code has inherent powers in its plenary jurisdiction *dehors* Section 34 of the Act of 1963. The suit preferred is not a suit for declaration of civil death *simpliciter*. The declaration of civil death is inextricably bound with the declaration of legal status

and heirship of the plaintiffs. The suit has been preferred by the plaintiffs seeking a declaration that they are the legal heirs of the person missing and that in such a suit, the Court can accept the presumption of death of the person in the light of the provisions of the Indian Evidence Act. Legal character can mean only the legal status of a person. Such status is said to be legal because an infringement of it can be enforced through a Court of law. Moreover, a legal right is a personal right which will amount to one's status. Such right involves a peculiarity of a personality arising from anything unconnected with the nature of the act itself which the person of inherence can enforce against the person of incidence.

13. Now, coming to the case at hand, it appears that Sanjay went missing on and from 3.10.2009. A complaint to that effect was lodged before the Inspector-in-Charge of the concerned police station. On the basis of such complaint a proceeding was initiated and investigation was conducted. Upon completion of such investigation a final report was filed on 20.6.2017. The documents to that effect have been marked as exhibits. In the plaint, giving particulars of the properties and/or assets left by Sanjay, the plaintiffs claimed themselves to be the ultimate beneficiaries thereof.

14. It would be useful to re-look the provisions of Section 107 and Section 108 of Indian Evidence Act which read thus :

'107. Burden of Proving death of person known to have been alive within thirty years: - 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. 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.'

15. It goes without saying that Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. This rule is subject to an exception contained in Section 108 in the sense that if the person, 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 ceased to operate. It is to be noted that though it will be presumed that person is dead but there is no presumption as to the date or time of death or to the circumstances under which death occurred.

16. In the case at hand, till date more than 13 (thirteen) years have elapsed and all due inquiries appropriate to the circumstances have been made but Sanjay could not be traced out. Upon completion of such enquiry and highest echelon of the police authority has issued non-traceability report stating that chance of tracing out the missing subject seems to be very remote. The appellants are facing acute problems in managing the properties left by Sanjay. Consequently, we are of the view that appellants can get the declaration as prayed for.

17. For the reasons discussed above, the impugned judgment and decree passed in the present appeal is set aside. The suit is decreed and declared that the husband of the plaintiff no. 1/ appellant no. 1 and father of the plaintiffs/appellant nos. 2, 3, 4, 5 & 6 namely, Sanjay Kumar Gupta has suffered a civil death as he is missing from 3rd October, 2009. Authority competent to issue certificate of death shall issue such certificate basing upon this judgment, if it is so approached.

18. The appeal be and the same is allowed, however, without any order as to the costs.

19. Let a decree be drawn up accordingly.

20. Let a copy of this judgment be sent to the learned court below forthwith.

21. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)