

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

SECOND APPEAL NO.78 OF 2020

JANARDHAN VITTHAL PUJARI  
VERSUS  
SUNITA GODHAJI PUJARI AND OTHERS

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Mr. A. N. Sabnis h/f Mr. V. G. Kodale, Advocate for the Appellant.

Mr. R. R. Karpe, Advocate for the Respondent Nos 1.

Mrs. P. V. Diggikar, AGP for Respondent Nos. 2 and 3 — State.

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CORAM : R.M. JOSHI, J

DATE : MARCH 20, 2023

PER COURT :

1. This Appeal filed by the Appellant/Orig. Defendant No. 1 takes exception to the judgement and decree passed by learned District Judge — 1, Shrirampur in R.C.A. No. 55/2016 dated 16.12.2019 confirming the judgement and decree dated 28.09.2016 passed by learned C.J.S.D., Shrirampur in R.C.S. No. 157/2009.

2. Learned Counsel for the Appellant assails the judgment and orders passed by the Courts below on the grounds that the subsequent suit bearing no. 157/2009 was not maintainable in view of the fact that the previous suit filed by the plaintiff for declaration of her husband to be dead being R.C.S. No. 80/2008 is

dismissed for want of prosecution under Order IX, Rule 8 and therefore, in view of order IX, Rule 9, bar created against her for filing fresh suit on the same cause of action. To support his submissions, reliance is placed on the judgment of Hon'ble Apex Court in case of Om Prakash Srivastava Vs. Union of India and Anr, (2006) 6 SCC 207 & Suraj Rattan Thirani and Ors Vs. Azamabad Tea Co. Ltd. and Ors, AIR 1965 SC 295. He further argued that the plaintiff has suppressed the material fact of filing of previous suit and which amounts to fraud & relied upon judgment of Hon'ble Apex Court in case of S. P. Chengalvarya Naidu (Dead) By Lrs Vs. Jagannath (Dead) By Lrs and Ors, (1994) 1 SCC 1. Lastly, he submits that the suit for declaration of civil death of the deceased is not tenable in view of the judgment of this Court in Zena Glayds Fremantal Vs. Herbert Charles Free Mental, 1949 SCC OnLine Bom., which is referred by Chattisgarh High Court in case of Ganga Bai Vs. Leela Bai widow of Dhanesh Kunwar and Others, AIR 2021 Chh 20. According to him, the judgment of this Court passed in Swati Abhay Deshmukh and Ors Vs. Abhay Purushottam Deshmukh and Anr in Second Appeal No. 18 of 2016 dated 26.02.2016 is *per incurium* as it

has not considered judgment in case of Zena (supra).

3. *Per contra*, learned Counsel for the Plaintiff rebutted arguments about tenability of suit. He submitted that both suits were filed for different cause of action and in this regard attention of this Court is drawn to the pleadings in both suits. He further submits that since the cause of action for filing of subsequent suit is different than the one in the previous suit, there is no bar for filing fresh suit as contemplated by Order IX, Rule 9 of CPC. He also denied the allegations of fraud and stated that mere non-disclosure of fact having no bearing on the suit, does not amount to suppression.

4. At the outset, this Court would like to deal with contention of the Appellant in respect of maintainability of the suit in the form filed before trial Court. In case of Zena Glayds Fremantal (supra) the suit was filed under Section 42 of Specific Relief Act, 1877, which is *pari materia* to the Section 34 of Specific Relief Act, and the facts as they appear in the said judgment indicate that plaintiff wife had filed suit against husband for declaration that he not

having been heard for seven years. It was held therein that though the suit is for declaration and it cannot be entertained unless it falls within the scope of Section 42 of the Specific Relief Act, 1877. It is further observed that the said section *inter alia* provides that any person entitled of 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 suit was dismissed with observation that the declaration sought in this suit is not character of such a kind.

5. Chattisgarh High Court in case of Ganga Bai (supra), by relying upon the judgment in case of Zena Glayds Fremantal (supra), has held that suit in this form is not maintainable under Section 34 of the Specific Relief Act.

6. In case of Swati (supra), this Court has observed as under:

7. *In the light of the dictum laid down by the Apex Court as above, I am of the firm opinion that the Civil Court acting under Section 9, has inherent powers*

*in its plenary jurisdiction de hors with reference to Section 34 of the Specific Relief Act to grant relief qua Section 108 of the Evidence Act. Therefore, the reason that Section 34 of the Specific Relief Act was required to be called in aids does not appear to be sound.*

7. Thus, in case of Swati (supra) this Court by relying upon *dictum* of Hon'ble Supreme Court in case of LIC of India Vs. Anuradha, AIR 2004 SC 2070, has held that the Civil Court under Section 9 of CPC has inherent powers in its plenary jurisdiction *de hors* with reference to Section 34 of Specific Relief Act, to grant relief *qua* Section 108 of Evidence Act.

8. The judgment in case of Swati (supra) proceeds on the inherent powers of Civil Court under Section 9 CPC, which aspect was not considered by this Court in case of Zena Glayds Fremantal (supra) and hence, both judgments are clearly distinguishable and a judgment in Swati (supra) is not *per incurium*. I am persuaded to follow view in case of Swati (supra). Thus, it is held that the suit filed in the present form is tenable.

9. Objection is also raised to maintainability of

suit on the ground that the previous suit was dismissed for non-appearance of the plaintiff under Order IX, Rule 8 CPC. There is no dispute about the fact that the defendant appeared in the said suit and thereafter for want of presence of plaintiff the suit came to be dismissed. However, in order to attract the bar under Order IX, Rule 9, what is relevant to be considered is that whether the subsequent suit is on same cause of action. Undoubtedly, suit on fresh cause of action does not attract said bar.

10. The cause of action for filing of the present suit is refusal on the part of Grampanchayat to issue death certificate of her husband. The Court may not be concerned about intention of the plaintiff in seeking reliefs and what is relevant for the purpose of maintainability of the suit after dismissal of the first suit is that there is a fresh cause of action. *Prima facie* consideration of pleadings in both suits sufficiently demonstrate that the later suit is filed as plaintiff had sought death certificate from Grampanchayat which was denied to her by Authority. By no stretch of imagination it could be said that the

plaintiff has no fresh cause of action to seek death certificate in respect of her husband who is not being heard for 20 years. Pertinently, defendant no. 2, in his written statement, opposes the contention of the plaintiff about Godhaji's death and claims him to be alive. Thus, it is not the case that claim of the plaintiff has not been under challenge.

11. With regard to allegation of suppression of fact and obtainment of decree by playing fraud upon the Court, it must be borne in mind that there must be an intention of the party to obtain advantage by non-disclosure of relevant and material fact. Here in this case, non-disclosure of the previous suit is claimed to be a fact not been brought to the notice of the Court. However, in view of this Court it could not be called as fraud being played upon Court by plaintiff, more particularly, when the pleading about previous suit is immaterial for decision of subsequent suit, in view of fresh cause of action. Thus, this is not the case where the defendant was able to show that the plaintiff has obtained the decree in question by playing fraud upon the Court. Considering peculiarity of facts in the

present case, judgments cited supra by Appellant are not applicable.

12. The above discussions shows that the law on the points is already settled and no substantial question of law is involved in this Appeal. Resultantly, Appeal stands dismissed.

**(R.M. JOSHI, J.)**

Malani