

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.441 OF 2019**

a/w

**CIVIL APPLICATION NO.1454 OF 2019
IN
FIRST APPEAL NO.441 OF 2019**

Pushpa Manmohan Upreti	]	
Age about 57 years, housewife,	]	
Residing at Flat No.09, Vinay	]	
Building Prayas Sadan C.H.S Ltd.	]	
Sector No.4, Plot No.98/99,	]	
Chheda Nagar, Chembur,	]	
Mumbai – 400 071.	]	Appellant (Orig. Plaintiff)

Vs.

1. The State of Maharashtra	]	
Through the Secretary, Ministry	]	
of Home Affairs, Government	]	
of Maharashtra, Mantralaya,	]	
Mumbai – 32.	]	
2. The Sr. Inspector of Police,	]	
Tilak Nagar Police Station	]	
Chembur, Mumbai – 400 071.	]	Respondents (Orig. Defendants)

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Mr. Rajendra Bhandari, for Appellant.

Mr. A.R. Patil, A.G.P, for Respondent-State.

Ms. Pushpa Manmohan Upreti, Appellant is present.

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CORAM	: PRITHVIRAJ K. CHAVAN, J.
RESERVED ON	: 20 th JULY, 2023.
PRONOUNCED ON	: 25 th JULY, 2023.

JUDGMENT:

1. By this appeal, appellant-original plaintiff challenges the judgment and order dated 31st October, 2018 delivered by the learned Ad-hoc Judge, City Civil Court, Mumbai in Short Cause Suit No.2051 of 2015 by which her suit seeking declaration of civil death of her husband who was not heard and had been missing for more than seven years was dismissed.

2. In short, facts are as follows.

3. The appellant claims to be wife of Manmohan Upreti. She was married to him on 29th April, 1997. Her husband was addicted to liquor. He suddenly disappeared on 11th January, 2004, in the sense, he did not return home. The appellant and her family members waited till March, 2006 with a hope that he will return. However, even after the death of his parents, appellant's husband did not return and, therefore, the appellant lost all her hopes.

4. The appellant, therefore, lodged a missing report at Chembur Police Station on 18th March, 2006. Despite search, the Police could

not trace her husband. Ultimately, a report came to be filed by the Investigating Agency dated 19th May, 2015. The appellant, therefore, presumed that her husband had died and, therefore, she moved an application in order to mutate her name in revenue record in respect of the property which is at Dehradun.

5. Interestingly, the appellant made State of Maharashtra as well as Senior Police Inspector, Tilak Nagar Police Station as defendants in the suit. Respondent No.1 in it's written statement took a plea that for want of statutory notice under section 80 of the Code of Civil Procedure, the suit is not maintainable. It is also contended by respondent No.1 that the plaint does not disclose any cause of action against it. Respondent No.1 has also raised issue of limitation as according to it, the suit is barred by limitation. The trial Court, however, while answering issue No.3 observed that the plaintiff had issued a notice to the defendant as per the provisions of section 80 of the C.P.C. However, the defendants have not challenged the evidence of the plaintiff and, therefore, the defendant has abandoned the objection raised by it, hence, issue was answered in the negative. Even otherwise, the respondents are not at all necessary parties to be joined in the suit for the reason that the

appellant had no right to claim any relief against the respondents since there was no cause of action or any relief claimed by the appellant in the plaint. What has been stated in paragraph 20 of the plaint cannot be said to be a cause of action for filing the suit and claiming the relief of declaration. The learned trial Judge having considered the provisions of section 34 of the Specific Relief Act and sections 107 and 108 of the Indian Evidence Act dismissed the suit.

6. I heard Mr. Bhandari, learned Counsel for the appellant and Mr. Patil, learned A.G.P, for Respondent-State.

7. At the outset, learned Counsel for the appellant submits that husband of the appellant was not heard and was missing since January, 2004. A missing report came to be filed at Tilak Nagar Police Station, Chembur on 18th March, 2006. The Police Station, by it's final communication dated 19th May, 2015 informed the appellant that despite making efforts, the Police could not trace the missing person either alive or dead. The Counsel submits that the suit was filed in 2015 itself and, therefore, it is within limitation.

8. Learned Counsel has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **L.I.C of India Vs. Anuradha, AIR 2004 Supreme Court, 2070**. It is argued that the trial Court ought to have decreed the suit, as according to the learned Counsel, finding arrived at by the trial Court that the trial Court cannot grant declaration under section 34 of the Specific Relief Act is erroneous. On the other hand, the learned A.G.P argued that the appellant has not adduced any evidence nor examined any neighbour or other persons staying in the vicinity.

9. At the outset, I do not find any reason to interfere with the impugned judgment wherein the learned Judge has rightly observed as to how the appellant is not entitled to seek the relief of declaration under section 34 of the Specific Relief Act. The learned trial Judge in paragraph 10 observed as under;

“10. From the above provision, it is see that for institution of the suit under Sec. 34, the plaintiff must be entitled for any legal character to any right to any property and; such suit is required to be filed against any person denying, or interested to deny such right of character. But from the pleadings of the plaintiff, it nowhere seen that she wants to say that she acquire any legal character or has any right to any property. Furthermore, there is nobody who is denying or

interested in denying such legal character. No doubt, from the pleadings of the plaintiff, it can say that the plaintiff become widow and therefore, she has any right to husband's property but she is not asking any declaration in respect of this but what she is asking is civil death of her husband. Furthermore, the proviso of the said section says that court shall not grant such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The suit is not for such relief other than a simple declaration. Therefore, in my view, the plaintiff's suit does not fall within the scope of Sec. 34 of the Specific Relief Act".

10. It is not the case of the appellant that anyone had denied her legal character or any right to the property or any averment in the plaint to the effect that anyone is interested to deny her such right or character. The suit is *sans* any averment that she had acquired any legal character or right to any property. There is no doubt that the appellant's husband has been missing since 11th January, 2004 and has not been heard till date.

11. The relief under section 34 of the Specific Relief Act is discretionary one and the plaintiff cannot claim the relief as of right. As such, relief has to be granted according to the sound

principles of *ex debito justitiae*. In the case of **L.I.C. of India Vs. Anuradha** (supra), the Hon'ble Supreme Court discussed the provisions of Sections 107 and 108 of the Evidence Act as regards presumption as to date/time of death of a person. It would be advantageous to quote paragraphs 14 and 15 of the said judgment;

“14. On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two Sections, in effect. 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 a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons 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 ceases to operate. Section 107 has the effect of shifting the burden of

proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted has the effect of shifting the burden of proof back on the one 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 the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. 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. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any Forum and in any legal proceedings the occasion for raising the presumption does not arise.

15. If an issue may arise as to the date or time of death the same shall have to be determined on evidence – direct or circumstantial and not by assumption or presumption. The burden of proof would lay on the person who makes assertion of

death having taken place at a given date or time in order to succeed in his claim. Rarely it may be permissible to proceed on premise that the death had occurred on any given date before which the period of seven years' absence was shown to have elapsed".

12. It can thus be seen that an occasion for raising the presumption under section 108 of the Evidence Act arise only when a question is raised in a Court, Tribunal or before an Authority who is called upon to decide as to whether a person is alive or dead. In the case at hand, no question was raised before the Civil Court or before any Authority calling upon to decide as to whether Manmohan Upreti is dead or alive and, therefore, there is no question of raising a presumption. The Hon'ble Supreme Court has made it amply clear that unless a dispute is raised before any forum or in a legal proceeding, the occasion of raising a presumption would not arise.

13. The Court below has observed that the appellant (plaintiff) is seeking such declaration so as to mutate her name in the revenue record in respect of the property of her missing husband. It is observed that the appellant (plaintiff) can apply for heirship

certificate as per the provisions of the Bombay Regulation Act, 1872. Thus, the plaintiff is not remediless.

14. In view of the aforesaid observations, I do not find any reason to interfere with the impugned judgment and order. As such, the appeal is without merit and hence, dismissed.

15. In view of disposal of the appeal, pending applications, if any, shall stand disposed of.

[PRITHVIRAJ K. CHAVAN, J.]