

## IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## R/SECOND APPEAL NO. 315 of 2021

## FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE A. P. THAKER Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

MANSINH AMARSINH DEVDHARA

Versus

STATE OF GUJARAT

Appearance:

MR DIGANT M POPAT(5385) for the Appellant(s) No. 1  
RULE NOT RECD BACK for the Respondent(s) No. 1

CORAM:HONOURABLE DR. JUSTICE A. P. THAKER

Date : 15/06/2022

## ORAL JUDGMENT

1. This Second Appeal is preferred under Section 100 of the Code of Civil Procedure against the judgment and decree passed by the 6<sup>th</sup> Additional District Judge, Surat in Regular Civil Appeal No. 53 of 2018, whereby the

appeal filed by the appellant who is original-plaintiff, came to be dismissed and the judgment and decree passed by the learned Senior Civil Judge, Surat in Regular Civil Suit No.385 of 2012 came to be confirmed.

2. The appellant is the original-plaintiff and the respondent is the original-defendant before the learned Trial Court. For the brevity and convenience, the parties are referred to in this Judgment as per the status assigned to them before the Trial Court.

3. The plaintiff has filed the suit for declaration to the effect that his son, Jitendrasingh Mansingh Devdhara was missing from Surat since 31.01.1984 and could not be found till the date of filing of the suit. It is alleged that necessary janvajog entry dated 05.02.1984 came to be given by Takhatsingh M. Devdhara before the Rander Police Station and the public notice in daily newspaper regarding missing of Jitendrasingh was published on 07.02.1984. According to the plaintiff, since the date of missing of his son, he has not heard any news about his missing son and about his aliveness. Therefore, the plaintiff has filed suit for declaration that his son has died and necessary entry to that effect may be made by the Surat, Nagarpalika in its record and for passing

decree in his favour.

4. It appears that no written statement has been filed by the defendant in the Trial Court. The Trial Court has framed issues at Exh. 21 in vernacular language, which on translation would read as under :

- (i) Whether the plaintiff proves that his son Jitendrasingh Mansingh Devdhara is missing from 31.06.1984 and he could not be found?
- (ii) Whether the suit is barred by the law of limitation?
- (iii) Whether the plaintiff is entitled for the relief sought for?
- (iv) What order and decree?

5. On the basis of the oral and documentary evidence on record and after hearing the learned advocate for the parties, the learned Trial Court has answered Issue Nos.1 and 2 in Affirmative and Issue No.3 in Negative and ultimately dismissed the suit only on the ground of delay, vide judgment and decree dated 27.10.2016. Against that judgment and decree, the plaintiff has preferred Regular Civil Appeal No.53 of 2018 before the

District Court Surat, which has ultimately dismissed the appeal on the ground of delay.

6. The main contention of the plaintiff is that the both the Courts below have committed serious error of law in dismissing the suit only on the ground of limitation. It is contended that the plaintiff has successfully proved his case by adducing evidence to the effect that plaintiff's son after leaving from home on 31.01.1984 for the purpose of attending college, never returned. That the plaintiff has produced the evidence with regard to the information of missing report being given to the concerned police station and thereafter, taking follow-up action for the same.

6.1. It is also contended that Police Machinery has miserably failed to take appropriate steps and ultimately the plaintiff having lost a young son was left with no other option to approach the learned civil court seeking declaration with a view to see that no illegitimate claims are made relating to his properties after such a long time.

6.2. It is contended that the view taken by both the Courts below regarding limitation is wrong applicability

of law of limitation. The Plaintiff has raised several questions of law in this appeal. However, this appeal has been admitted only on the following questions of law:

*“In the facts and circumstances of the case, whether the Courts below are justified in dismissing the suit only on the ground of limitation?”*

7. Heard learned advocate Mr. D.M. Popat for the plaintiff-appellant and learned AGP Mr. Adityasinh Jadeja for the respondent-State. Perused the material placed on record and decisions cited as bar.

8. My findings on the above question, for the reason given below, is as under :

Point No.1 : In the Affirmative.

#### Reasons

9. Learned advocate Mr. D.M. Popat for the plaintiff – appellant has submitted that both the Courts below have committed serious error of law in dismissing the suit and appeal only on the ground of law of limitation. He has submitted that plaintiff was awaiting for return of his son for a long time as he could not have any clue

of his aliving and Police could not find out him. Ultimately, the plaintiff has filed the said suit for declaration, which has not been contested by the defendant.

9.1. He has submitted that considering the facts and circumstances of the case, the law of limitation is not applicable and therefore, the impugned judgment and decree of both the Courts below needs to be set aside and necessary decree in favour of the plaintiff needs to be passed.

9.2. Mr. Popat has relied upon the decisions rendered in the case of *LIC OF INDIA v. ANURADHA* reported in (2004) 10 Supreme Court Cases 131.

10. Learned AGP Mr. Adityasinh Jadeja for the respondent - defendant has submitted that considering the facts and circumstances of the case, appropriate order may be passed.

11. Having considered the averments made on behalf of the both the sides coupled with the material placed on record, it clearly transpires that the plaintiff has filed the suit for declaration to the effect that his son viz.

Jitendrarsingh is missing since 31.01.1984. It is pertinent to note that the pleading of the plaintiff has not been denied by the defendant by filing any written statement. On perusal of the material placed on record, it is clearly found that during the trial, the plaintiff has produced necessary documentary evidence showing that necessary Report of missing Jitendrarsingh has been made to the concerned Rander Police Station on 05.02.1984 and on public advertisement was issued in the Newspaper dated 07.02.1984. It also reveals that the evidence of plaintiff has not been controverted by the other-side. It also reveals that the plaintiff has approached Police under R.T.I. Act and got reply from the Rander Police Station to the effect that due to flood in the year 2006 all documents of 1981 to 2001 was destroyed in the flood. Therefore, no other relevant documents pertaining to the report of his missing son is available. The plaintiff has waited for returning of his son since he could not return back and even Police could not find him out. Ultimately, he has filed the suit for declaration.

12. It appears from the impugned judgment of the Courts below that they have relied upon Section 108 of the Evidence Act for their observations that the suit is barred by law of limitation. At this juncture, it is

worthwhile to reproduce Section 108 of the Evidence Act:

*“108. Burden of proving that person is alive who has not been heard of for seven years.—1[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 2[shifted to] the person who affirms it.—1[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 2[shifted to] the person who affirms it.”*

13. Section 108 of the Evidence Act clearly provides only for raising presumption. It is a limited presumption confined only to presume the factum of death of the person who's life or death is in issue. There is no presumption as to the facts and circumstances under which the persons may have died. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose, subject to a period of seven years absence, and being unheard of having elapsed before that time. At what point of time the person was dead is not a matter of presumption, but of evidence, factual or

circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death.

14. Recourse to the provision of Section 108 cannot be made for deciding starting of point of cause of action, as when any member of family is missing, for whatever reasons, the other members of the family will definitely be waiting for return of such missing person. Such waiting period may be ever for decades. There cannot be any assumption or presumption that after certain period of time, the family members would automatically consider that the missing person has died on a particular date or within a particular point of time. Therefore, if father is waited for returning of his son before previous day of filing of the suit, it cannot be held that limitation period has started after seven years of date of missing of his son. The entire approach as adopted by both the Courts below in deciding the question of limitation is completely erroneous. They have lost sight of the facts that it is a human tendency to wait for returning of a missing

member of the family for many years. Therefore, in the suit for declaration of the fact that the person be declared as a dead since he is missing for many years cannot be based upon the presumption or assumption arose under Section 108 of the Evidence Act.

15. Admittedly in the present case, the young son was missing and appropriate information was provided to the police and even by advertisement in the newspaper and yet the Police could not find out him nor the missing son returned back to the family. Under these circumstances, if the father has waited for many years for returning of his son, his claim for declaration cannot be turned down solely based upon the presumption under Section 108 of the Indian Evidence Act. The cause of action for declaration of death of such missing son would arose, as and when, it is admittedly believed by the father and the family members that he might be dead. Therefore, under the facts and circumstances of this case, it clearly shows that the suit is not barred by the law of limitation. The entire approach of the learned Trial Court as well as the learned Appellate Court are not sustainable in the eyes of law. Therefore, the judgments and decrees passed by both the Courts below need to be set aside and the suit of the plaintiff deserves to be

allowed. Therefore, I have decided point No.1 in affirmative accordingly.

16. In view of the above, I pass the following final order in the interest of justice:-

The present Second Appeal is hereby allowed. The judgment and decree passed by the learned 6<sup>th</sup> Additional District Judge Surat in Civil Appeal No. 53 of 2018 and judgment and decree passed by the 9<sup>th</sup> Additional Senior Civil Judge, Surat in Regular Civil Suit N0.385 of 2012 are hereby quashed and set aside.

The suit of the plaintiff is allowed *in toto* and it is declared that the plaintiff's son Jitendrasingh Mansingh Devdhara is deemed to have been died on 31.01.1984. Necessary entry regarding his death to be made in the relevant Register by the defendant.

Considering the facts and circumstances of the case, the parties are directed to bear their respective costs of all the proceedings.

Decree to be drawn accordingly in the Second Appeal.

With the copy of this judgment and decree, R & P  
be sent back to the learned Trial Court.

Sd/-  
**(DR. A. P. THAKER, J)**

KUMAR ALOK

