

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 23 of 2002**

1. Soma, S/o. Chamru, 48 years,
2. Faganu, S/o Chamru, 46 years,
3. Jhitru, S/o. Chamru, 43 years,
4. Jhitra, S/o. Chamru, 42 years.
5. Sukru, S/o. Chamru, 38 years,

All R/o. Village Chindgaon, Teh. Jagdalpur, Distt. Bastar.

---- Appellants/defendants.

Versus

- 1(a) Mohan, S/o. Sona, 41 years.
- 1(b) Hari, S/o. Sona, 39 years.
- 1(c) Urdo, S/o Sona, 33 years.
2. Mangadu, S/o Raghunath, 63 years.
3. Ayatu, S/o. Doma, 38 years.

All R/o. Vill. Chindgaon, Teh. Jagdalpur, Distt. Bastar (C.G.)

---- Respondent/plaintiffs.

For Appellants	:	Mr. Prafull N. Bharat, Advocate.
For Respondent	:	None.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

06/09/2018

(1) The substantial questions of law involved, formulated and to be answered in this defendants' second appeal state as under:

“1. Whether the Courts below were justified in holding the suit to be within limitation ?

2. Whether the Courts below were justified in not applying the principle

of *res judicata* and at any rate in not considering whether the second suit was at all, the first having been withdrawn, maintainable ?

(For the sake of convenience, parties would be referred hereinafter as per their status shown in the suit before the trial Court).

(2) The imperative facts required to be noticed for adjudication of this appeal are as under:

(2.1) The plaintiffs filed a suit for declaration of title and permanent injunction stating *inter alia* that they are joint owner and possession holder of the suit land and that has been recorded in the name of their ancestors, as such, they are exclusive owner of the suit land. During *Bandobast* of village Chhindgaon, District Bastar in the year 1993, it was informed to them that the land bearing Khara No. 525 & 537/7 is registered in the name of defendants and when they came to know about the said fact, the plaintiffs preferred filed a suit for declaration of title and permanent injunction, in which, defendants filed written statement stating that suit is barred by limitation and hit by principle of *res judicata*.

(2.2) The trial Court decreed the suit in favour of the plaintiffs and recorded a finding of limitation and *res judicata* against the defendants, which was maintained by the first appellate Court. Questioning the judgment and decree passed by the first appellate court, this second appeal has been preferred by the appellants/defendants in which the substantial questions of law formulated for consideration has been incorporated in the opening paragraph of the judgment.

(3) Learned counsel for the appellants/defendants would submit that both the courts below ought to have held that the suit to be barred by limitation; and also submits that the first suit was withdrawn by order dated 26.07.1994 and, therefore, the second suit was not maintainable rather it was covered under the principle of *res judicata* under Order 23 Rule 3 of the Code of Civil Procedure.

(4) I have heard learned counsel appearing for the appellants and perused the judgment

and decree impugned including record of both the courts below.

(5) Both the courts below have concurrently recorded a finding that during the Bandobast of village Chhindgaon, District Bastar, the plaintiff came to know about the adverse entry in the revenue records and, thereafter, they filed suit for declaration of title and permanent injunction for which the period of limitation would be 12 years under Article 65 of the Limitation Act, as such, I do not find any illegality or perversity in the said finding recorded by both the courts below concurrently.

(6) The next plea that the suit was barred as the earlier suit filed by plaintiff being Civil Suit No.259-A/93 was withdrawn on 26.07.1994.

(7) Learned counsel for the petitioner relying upon the decision of the Andhra Pradesh High Court in the matter of ***Jonnala Sura Reddy and another V. Tityyagura Srinivasa Reddy and others***¹, in which it has been held that if the earlier suit filed by plaintiff is withdrawn without seeking permission to file fresh suit, then subsequent suit for the same relied is barred.

(8) In the matter of **Sheodan Singh Vs. Daryao Kunwar**², their Lordships of the Supreme Court held that plea of res judicata would not be maintainable when the suit is not decided on merits. Relevant paragraph of the report states as under :-

“13. in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff 's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a

1 AIR 2004 AP 222

2 AIR 1966 SC 1332

decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit.”

(9) In the instant case, both the courts below have concurrently recorded a finding that defendants have failed to prove that the earlier civil suit being No.259-A/93 was withdrawn on 26.07.1994 without any liberty in favour of the plaintiff to file fresh suit as it is evident from the record that neither copy of order dated 26.07.1994 was filed nor any other document has been brought by the defendants to demonstrate the said fact, therefore, the defendants cannot succeed on this ground. Thus, both the substantial questions of law are answered against the defendants.

(10) Consequently, the appeal deserves to be and is hereby dismissed.

(11) A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

