

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.338 of 2005**

Mst. Bigni Bibi, Wife of Israil Mansoori, aged about 40 years;
Resident of Village Ramchandrapur, Tahsil Pal, District Surguja
(CG)

---- Appellant/Plaintiff

Versus

1. Sarazuddin, Son of Late Shafi Miyan, aged about 42 years;
2. Mohammed Yusuf, Son of Late Shafi Miyan, aged about 35 years;
3. Rahman Son of Late Shafi Miyan, aged about 30 years;
All Resident of Village Ramchandrapur, Tahsil Pal, District Surguja
(CG)
4. Aliman Wife of Azad, aged about 40 years; resident of Village
Mahaveer Ganj, Tahsil Pal, District Surguja (CG)
5. Majiran Wife of Sultan Ahmed, aged about 33 years; Resident of Vil-
lage Ghurki, District Gadhwa (Bihar Region)
6. Basiran Wife of Jakir Husain, aged about 31 years, Resident of Vil-
lage Basantpur, Tahsil Wadraf Nagar, District Surguja (CG)
7. Prithvi Prasad Sao Son of Late Dewangan Sao, aged about 28
years; Resident of Village Ramchandrapur, Tahsil Pal, District
Surguja (CG)
8. State of Madhya Pradesh (Now Chhattisgarh), Through: The
Collector, Surguja Ambikapur (CG)

---- Respondents

For Appellant/Plaintiff	:	Mr.Sushil Dubey, Advocate
For Res.No.7/Defendant No.2:		Mr.Manoj Paranjape and Anurag Singh, Advocates
For Respondent No.8	:	Mr.I.Lakra, Govt.Advocate

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

12.07.2019

1. The substantial question of law involved, formulated and to be
answered in the second appeal preferred by the appellant/plaintiff is

as under:-

“Whether the first appellate court was justified in reversing the findings of trial court and in holding the appellant's suit as barred by limitation in a case where the respondent had not taken plea of adverse possession in the written statement ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. The plaintiff filed a suit for declaration of title, recovery of possession and permanent injunction stating inter-alia that the suit land, total 32 decimal was gifted to her by one Panwa Bibi and out of which, 14 decimal was got registered by father of defendant No.1-Shafi Miyan in his name and thereafter, defendant No.1 sold 9 decimal land in favour of defendant No.2-Prithi Prasad Sao and he has erected the wall on the suit land, for which she is entitled for decree.
3. The defendants filed their written statement controverting the allegations made in plaint stating inter-alia that the plaintiff is not entitled for decree.
4. The trial Court framed as many as 7 issues and out of which, 5 issues were answered in affirmative holding that the plaintiff is owner and title holder of the suit land and sale deed dated 24.9.92 is illegal and void and granted decree in her favour. Feeling aggrieved and dissatisfied with the judgment and decree of the trial Court, the defendants preferred first appeal under Section 96 of the CPC. The first appellate Court reversed the judgment and decree of

the trial Court and held that the suit is barred by limitation. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.

5. Mr.Sushil Dubey, learned counsel for the appellant/plaintiff, would submit that the first appellate Court is absolutely unjustified in dismissing the suit by considering a new plea of limitation, which is a mixed question of law and fact. No such plea was expressly taken by the defendants before the trial Court and no such issue was framed by the trial Court. He would further submit that the first appellate Court could not have been dismissed the suit on the ground of limitation, which was never taken before the trial Court.
6. On the other hand, Mr.Manoj Paranjape, learned counsel for respondent No.7/defendant No.2, would support the impugned judgment and decree.
7. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
8. The only question for consideration would be whether the first appellate Court is justified in reversing the judgment and decree of the trial Court holding that the suit is barred by limitation.
9. A careful perusal of written statement would show that though in para-2, plea of limitation has been taken by the defendants, but it

appears that the defendants did not press the said plea before the trial Court and consequently the trial Court did not frame any issue based on such plea of limitation and thereafter the suit proceeded and ultimately, decree was granted in favour of the plaintiff on merits, but before the first appellate Court, plea of limitation was taken and it was entertained and suit was dismissed.

10. It is well settled law that plea of limitation is a mixed question of law and fact and therefore, the parties are entitled to lead evidence on the issue of limitation. In the instant case, the defendants did not press plea of limitation before the trial Court, as such, the first appellate Court could not have been entertained a new plea of limitation, which was not raised and considered by the trial Court, by which the plaintiff has suffered great prejudice. In view of above, the impugned judgment and decree passed by the first appellate Court is set aside and that of the trial Court is restored. The substantial question of law is answered in favour of the plaintiff and against the defendants. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-