

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 328 of 2005**

1. Gullu S/o Late Ramdas Khairwar, aged about 60 years (Dead) through Lrs.

A. Basant S/o Late Gullu, aged 40 years.

B. Basawan S/o Late Gullu, aged 35 years.

C. Raghunath S/o Late Gullu (died) through Lrs.

a. Ravindra Nath S/o Late Raghunath, aged about 25 years.

b. Vidyasagar S/o Late Raghunath, aged about 19 years.

Both R/o Village Mukha, P.S. Rajpur, Tahsil Balrampur, District Balrampur, Ramanujganj, Chhattisgarh.

Appellants No. 1.A. and 1.B. are R/o Village Murwa, Tahsil Pal, District Surguja, Chhattisgarh.

2. Bharat S/o Late Nanhak Khairwar, aged 45 years, Occupation Agriculture, R/o Village Mukha Tahsil Pal, District Surguja, Chhattisgarh.

---- Appellants/Plaintiffs

Versus

1. Jayshree S/o Nanh Khairwar, Aged 20 years.
2. Ajgar S/o Nanh Khairwar, aged 15 years, Minor, through natural guardian & father Nanh Khairwar S/o Nadhira.
3. Nanh S/o Nadhira Khairwar (deleted).
4. Parasram S/o Mahesh Khairwar, (died) through Lrs.

a. Dhansay S/o Late Parasram, aged about 28 years, R/o Village Mukha, P.S. Rajpur, Tahsil Balrampur, District Balrampur, Ramanujganj, Chhattisgarh.

All R/o Village Mukha, Tahsil Pal, District Surguja, Chhattisgarh.

5. The State of M.P. (Now C.G.) through Collector, Surguja, Ambikapur, Distt. Surguja, Chhattisgarh

----Respondents/Defendants

For Appellants/Plaintiffs	:	Mr. Rishi Mahobia, Advocate
For Respondents/Defendants	:	None
For State	:	Ms. Shivali Dubey, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

23.07.2019

1. The instant second appeal preferred by the plaintiffs was admitted for hearing on the following substantial questions of law:

“1. Whether the finding of the first appellate Court in dismissing the suit holding it to be barred by limitation is proper, legal and justified or not ?

2. Whether the finding of the Court below that the will deed executed in favour of Ramkalia by Rukmani Devi was not necessary to be proved so far as the claim of defendant over the suit property is concerned as proper, legal and justified or not ?”

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

2. Originally the suit property was held by Chaihat Khairwar. He died, leaving behind three sons namely Bigu, Ramdas and Nanhku. Gullu (deceased plaintiff No. 1) is the son of Ramdas and Bharat (plaintiff No. 2) is the son of Nanhku. Bigu, after giving divorce to her first wife – Teeka Devi, married with Rukmani, with whom he has a daughter namely Ramkalia. Defendants No. 1, 2 are the sons of Ramkalia and defendant No. 3 is her husband.

3. Plaintiffs brought Civil Suit No. 34-A/98 for declaration of title

and permanent injunction holding that they have 2/3rd share in the suit properties shown in Schedule “A” and “B” annexed with the plaint. The defendants filed their written statement on 21/12/1998 and controverted the allegations made in the plaint holding *inter alia* that the suit properties shown in Schedules “A” and “B” are the self-acquired property of Bigu, father of Ramkalia, and therefore, the plaintiffs have no title over the suit land. It was also additionally pleaded by the defendants that so far as the property mentioned in Schedule “B” is concerned, will deed was executed by Rukmani – wife of Bigu, in favour of Ramkalia – daughter of Bigu, therefore, the suit deserves to be dismissed.

4. Learned trial Court, by its judgment and decree dated 27/10/1999 held that the suit property shown in Schedule “A” of the plaint belonged to Plaintiffs' fathers jointly i.e. Ramdas and Nanhku as well as their brother Bigu, therefore, plaintiffs No. 1 and 2, both of them are entitled for 2/3rd share of the suit property. However, the trial Court has also held that the suit property shown in Schedule “B” is the self-acquired property of Bigu, and as such, partly decreed the suit holding that the plaintiffs are not entitled for any declaration and injunction.
5. Being aggrieved by the judgment and decree passed by the trial Court with regard to the suit property shown in Schedule “A”, the defendants preferred first appeal bearing No. 11-A/2002. Though learned first appellate Court has held that the trial Court has rightly decreed 2/3rd share in favour of the plaintiffs in relation to the suit property shown in Schedule “A”, after having held that the property shown in Schedule “B” was

held by Bigu, but allowed the appeal and dismissed the suit vide judgment and decree dated 13/04/2005 holding that the suit is barred by limitation.

6. Against the judgment and decree of the first appellate Court, this second appeal has been preferred by the plaintiffs in which substantial questions of law have been framed and set out in the opening paragraph of the judgment.
7. Mr. Rishi Mahobia, learned counsel appearing for the plaintiffs would submit that the plea of limitation was not expressly raised by the defendants before the trial Court, therefore, the trial Court did not frame an issue and consequently, no finding was recorded. The first appellate Court entertained the plea of limitation without notice to the plaintiffs. He further submits that though the first appellate Court agreed with the findings of the trial Court that the plaintiffs are entitled for 2/3rd share in the suit property shown in Schedule "A" of the plaint yet, dismissed the suit by granting the appeal, therefore, the impugned judgment and decree are liable to be set aside.
8. None appears for the defendants even though notice was served upon them.
9. I have heard learned counsel for the plaintiffs, considered his submissions and went through the records with utmost circumspection.
10. In the suit filed by the plaintiffs, defendants No. 1, 2 and 3 filed the written statement. In paragraph 13 of the written statement, though they have casually pleaded that the suit is barred by limitation, but it appears that it was not pressed into service and

consequently, no issue was raised and tried by the trial Court. In the first appeal, ground No. 14 has been raised by the defendants that the suit is barred by limitation and it was eventually entertained and allowed by the first appellate Court, setting aside the decree of the trial Court.

11. The question of limitation is a mixed question of law and fact, therefore, it ought to have been raised by the defendants before the trial Court, which though they have pleaded in the written statement, but later on they did not press and as such, it was not tried by the trial Court and therefore, it could not have been permitted to be raised for the first time by the first appellate Court in the first appeal.

12. The finding of the first appellate Court *qua* limitation on merit also cannot stand for the reason that learned trial Court has held that the plaintiffs as well as the legal heirs of Bigu, all three of them are co-owners of the property shown in the Schedule "A" of the plaint. Admittedly, plaintiffs are in possession of the suit land and the possession of co-owner is deemed to be the possession on behalf of other co-owners. Therefore, the first appellate Court has committed error in holding the suit to be barred by limitation and accordingly, the decree of the trial Court is set aside.

13. The first appellate Court has affirmed the finding of the trial Court, in paragraph 10 of its judgment, granting decree for declaration that the plaintiffs are possession and title-holders of 2/3rd share of the property mentioned in Schedule "A", whereas it ought to have dismissed the suit rather than granting the appeal. Accordingly, the finding recorded by the first appellate

Court in paragraph 13 of its judgment holding the suit to be barred by limitation and thus, setting aside part of the decree in favour of the plaintiffs is hereby set aside, as it has been held by the learned trial Court as well as the first appellate Court that plaintiffs are entitled for the decree with regard to the 2/3rd share of the property shown in Schedule "A". In view of that, answer to the substantial question of law No. 2 would be unnecessary.

14. The second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

15. A decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge