

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 175 of 2007**

Chaitram, S/o – Late Dhansingh, 26 yrs. (S/o- Samrath as mentioned in the impugned order) R/o Vill. Rajnagar, Teh. Jagdalpur, Distt. Bastar (C.G.)

---- Appellant/Plaintiff

Versus

1. Kamla Bai, D/o Dhan Singh, W/o Hemraj, aged about 55 years, R/o. Vill. . Riva Gahan, Teh. Dhamtari, At present Vill.Rajnagar, Teh. Jagdalpur, Distt. Bastar (C.G.)

2. State of Chhattisgarh, Through : The Collector, Bastar, Jagdalpur.

---- Respondents/defendants.

For Appellant/Plaintiff	:	Mr. Prafull N. Bharat, Advocate.
For Respondent No. 1	:	None present.
For Respondent No. 2	:	Ms. Shivali Dubey, PL

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

16/08/2019

(1) The substantial question of law involved, formulated and to be answered in this second appeal preferred by plaintiff states as under:

“Whether the First Appellate Court was in error in reversing the judgment and decree passed by the trial Court on the grounds that the plaint did not disclose when the cause of action arose in favour of the plaintiff and that the suit was barred by limitation ?

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given 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 suit property was originally held by one Dhan Singh. After death of Dhan Singh, his wife Foolbati succeeded the suit property. It is the case of the plaintiff that he is the adopted son of Dhan Singh & Foolbati. But after death of Foolbati, the defendant No. 1 claiming to be the daughter of Dhan Singh started interfering with the suit property leading to filing of bare suit for declaration of title, in which defendant No. 1 appeared and claimed to be the daughter of Dhan Singh and also incidentally pleaded that the plaintiff has no cause of action and the suit is barred by limitation but the trial Court did not frame any issue with regard to non accrual of the cause of action and the suit is barred by limitation and ultimately the suit was decreed in favour of plaintiff, which the defendant No. 1 challenged by way of filing first appeal. The first appellate Court, by the impugned judgment & decree dated 21.03.2007 allowed the appeal on the ground that no cause of action has arisen in favour of the plaintiff to institute the suit and the suit filed on 14.1.2002 was barred by limitation as the Foolbati died in the year 1996 -97 and, therefore, the suit ought to have been filed within three years from the date of death of Foolbati in view of the provision of Article 58 of the Indian Limitation Act, 1963 (henceforth "Act, 1963"), against which this second appeal has been preferred by the appellant/plaintiff in which the substantial question of law has been formulated and set out in the opening paragraph of the judgment.

(3) Mr. Prafull N. Bharat, learned counsel appearing for the appellant/plaintiff would submit that no such specific plea of non accrual of cause of action was taken before the trial Court and similarly no plea of limitation was expressly taken before the trial Court and, therefore, no issues were framed by the trial Court in these regards and, therefore, the first appellate Court could not have entertained such a plea as it was mixed

question of law and fact and requires recording of evidence and, as such, judgment and decree of the first appellate be set aside and that of trial Court is restored and thereby plaintiff's suit be decreed.

(4) None for respondent No.1, though served.

(5) I have heard learned counsel appearing for the appellant and considered his submissions and went through the record with utmost circumspection.

(6) First I will take up the finding of the first appellate Court with regard to non accrual of the cause of action in favour of the plaintiff, which was made basis for reversing of the judgment and decree of the trial Court. Though, the plaintiff has categorically pleaded that he is the adopted son of Foolbati, who died in the year 1996-97 but, thereafter, after few years respondent No. 1 started interfering with his suit property that has given rise to cause of action to the plaintiff and he instituted a suit for declaration of title on 14.1.2002, which was denied by defendant No. 1 but no specific plea that no cause of action has arisen was pleaded by defendant No.1 before the trial Court and no issue was framed in this regard. In fact, if there is error in the pleading with regard to cause of action, the first appellate Court ought to have given an opportunity to the plaintiff to correct the pleading with regard to cause of action as held by the Supreme Court in the matter of **Pratibha Singh and another Vs. Shanti Devi Prasad and another**¹, which states as under :-

“15..... The default or carelessness of the parties does not absolve the trial court of its obligation which should have, while scrutinizing the plaint, pointed out the omission on the part of the plaintiffs and should have insisted on a map of the immovable property forming the subject-matter of the suit being filed. This is the first error.”

1 (2003) 2 SCC 330

(7) Even otherwise, the plea with regard to cause of action is a mixed question of law and fact and if the opportunity could have been given to plaintiff, he could have amended the cause of action during the course of the trial itself, even the first appellate Court did not grant any opportunity and straightway dismissed the suit on the ground that cause of action has not been pleaded by the plaintiff clearly and precisely. In the opinion of the Court, the plaint clearly discloses cause of action for instituting suit.

(8) Coming to the plea of limitation, the First appellate Court has held that the suit is barred by limitation relying upon Article 58 of The Limitation Act, 1963, which states as under:-

	Description of suit	Period of limitation	Time from which period begins to run
58.	To obtain any other declaration <i>Explanation.</i> —For the purposes of this article—	Three years	When the right to sue first accrues

(9) The word “when the right to sue first accrues within the meaning of Article 58 of the Act, 1963 came to be considered by the Supreme Court in the matter of **Mst. Rukhmabai v. Lala Laxminarayan and others**², in which it has been held that there can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted. Paragraph 33 of the report states as under :-

“33. The legal position may be briefly stated thus : The right to sue under Art. 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by

2 AIR 1960 SC 335

the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.”

{Article 120 of the Limitation Act, 1908 is equivalent to Article 58 of the Indian Limitation Act, 1963}.

(10) Reverting to the facts of the present case in light of decision rendered by the Supreme Court in the afore-cited case (supra), the finding of the first appellate Court that under Article 58 of the Act, 1963 the suit must have been filed within three years from the date of death of Foolbati runs contrary to the period as provided in Article 58 of the Act, 1963 and time would start running when there is infringement of right of the plaintiff over the suit land. In view of that the first appellate Court is absolutely unjustified in setting aside the judgment & decree of the trial Court that the plaint did not disclose the cause of action in favour of the plaintiff and the suit is barred by limitation.

(11) Resultantly, judgment and decree passed by the first appellate Court are set aside and judgment and decree passed by the trial Court are restored. The second appeal is consequently, allowed and the plaintiff's suit stands decreed with no order as to cost(s).

(13) A decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

