

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on : 01.02.2019****Judgment delivered on : 22.02.2019****First Appeal No. 168 of 2008**

1. Himanchal Singh S/o Late Narayan Singh Thakur, aged about 50 years
 2. Mahendra Singh S/o Late Narayan Singh Thakur, aged about 38 years
 3. Sumendra Singh S/o Late Narayan Singh Thakur, aged about 34 years
- All R/o village Kotri, Tahsil Sarangarh, District Raigarh, Chhattisgarh.

---- Appellants**Versus**

1. State of Chhattisgarh through Collector, Raigarh, District Raigarh, Chhattisgarh.
 2. Onkar Singh S/o Jeevan Singh, aged about 62 years
 3. Shravansingh S/o Jeevan Singh, aged about 60 years
 4. Shravanjeet Kaur W/o Ajit Singh
- All R/o Bus-Stand, near Laltanki Kewadabadi Chowk, Raigarh, Tahsil and District Raigarh, Chhattisgarh.

---- Respondents

For Appellants : Mr. R. Pradhan and Shri Shikhar Sharma,
Advocates.

For Respondent/State : Mr. Gagan Tiwari, Dy. Govt. Advocate.

For Respondents 2 to 4 : None.

Hon'ble Shri Justice Parth Prateem Sahu**C A V Judgment**

1. The appellants/plaintiffs have assailed the legality, validity and propriety of the impugned judgment and decree dated 11.04.2008 passed by learned District Judge Raigarh, District

Raigarh, Chhattisgarh in Civil Suit No.4-A/2007 whereby the learned trial Court dismissed the suit after framing and deciding the preliminary issues.

2. Brief facts for disposal of this appeal, are that, the plaintiffs have filed a suit for declaration of title and further declaration that the execution proceedings of Civil Suit No.61-B/1972 and entries made in revenue records in favour of defendants No.2 to 4 in pursuance to the execution proceedings to be declared illegal and void as well as claimed relief of possession from defendants No.2 to 4 on the ground that father of defendants No.2 to 4 have filed a civil suit for recovery of an amount of Rs.1,590/- along with interest @ 6% per annum from 01.06.1969. It has been pleaded that civil suit was decreed. It has been further pleaded that father of defendants No.2 to 4 by suppressing the correct facts have got property in dispute attached in execution proceedings and subsequently, in an auction proceedings held by the Executing Court, had purchased the suit property himself fraudulently. It has been also pleaded that as the father of the plaintiffs do not have any other land, therefore, as per the provisions of Section 165(7) of the Chhattisgarh Land Revenue Code, 1959 (hereinafter referred to as the 'Code, 1959'), the property in dispute cannot be attached in any execution proceedings. The date of knowledge with respect to illegal proceedings of attachment drawn by Executing Court was mentioned as 26.07.2004 when

they perused the revenue records and thereafter suit was filed after obtaining the certified copies of the judgment and decree.

3. Defendants No.2 to 4 submitted written statement to the suit and pleaded that they are the owner and possessor of the land in dispute which their father have purchased in an auction proceedings through the Court and thereafter in valid mutation proceeding, their names have been mutated in the revenue records. They have denied that there was any loan transaction between father of the plaintiffs and father of defendants No.2 to 4. It has also been pleaded that in a suit for recovery of an amount decreed in favour of father of defendants No.2 to 4 has been attached by the competent civil Court and the competent civil Court in a valid execution proceedings, attached the property and thereafter, put it to auction and in the said auction, the property in dispute was purchased by father of defendants No.2 to 4 and there is no question of fraud or forgery. It has also been pleaded that the pleadings made by the plaintiffs with respect to the date of knowledge i.e. 26.07.2004 with respect to the judgment and decree passed in Civil Suit No.61-B/1972 and its execution proceedings to be false and fabricated because the dispute between the parties had already been taken place with respect to same property before different forums on the same issues. It has been also pleaded that the suit is barred by limitation. Further, the objection with respect to the proper valuation of the suit has

been raised.

4. On the basis of pleadings made by the respective parties, learned trial Court had framed as many as seven issues for consideration along with issues of valuation, proper Court fees as well as with respect to limitation i.e. whether the suit is filed within the period of limitation or not? The issues framed by the learned trial Court are reproduced herein below :-

- “(1) क्या व्यवहार वाद क्र० 61ब/72 में द्वितीय व्यवहार न्यायाधीश वर्ग-2 के द्वारा पारित आज्ञाप्ति के पालन में की गई निष्पादन की कार्यवाहियां अवैध एवम् शून्य है ?
- (2) क्या उक्त आज्ञाप्ति के तारतम्य में राजस्व अभिलेखों में इन्द्राज की कार्यवाहियां अवैध एवम् शून्य है ?
- (3) क्या वादीगण प्रतिवादी क्र० 2 से 4 से वादग्रस्त संपत्ति का रिक्त आधिपत्य प्राप्त करने के अधिकारी है ?
- (4) क्या वाद का उचित मूल्यांकन किया गया है ?
- (5) क्या पर्याप्त न्यायशुल्क अदा किया गया है ?
- (6) क्या दावा समयावधि के भीतर पेश है ?
- (7) सहायता एवम् व्यय ?

5. Learned trial Court had decided issues No.4, 5 and 6 as preliminary issues and dismissed the suit being not maintainable being barred by limitation.
6. Learned counsel appearing for the appellants submitted that learned trial Court has committed an error in not considering the provision of Section 165(7) of the Code, 1959 and further

committed grave error in dismissing the suit only on the preliminary issues without recording evidence that too on the ground of limitation, which is not permissible in law. He further submitted that the question of limitation is a mixed question of law and fact, therefore, the same could not be decided as preliminary issue.

7. Learned counsel appearing for the State though is a formal party, submitted that question of limitation is a mixed question of fact and law and the same could have been decided after recording evidence of respective parties only and further that the issue of limitation cannot be decided as a preliminary issue.
8. I have heard learned counsel appearing for the parties and perused the records carefully.
9. Perusal of the records would show that civil suit was filed by the plaintiffs on 16.03.2006. Thereafter, defendants No.2 to 4 have filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'). In the said application, it has been pleaded with respect to the suit being barred by law and indirectly, it also reads that the suit is filed after 40 years and they are in possession of the property in question, therefore, the suit itself is not maintainable. The said application was decided by the learned trial Court vide its order dated 05.05.2007 and dismissed the application under Order VII Rule 11 of the CPC. Thereafter, the

written statement has been filed and issues were framed on 25.08.2007 and learned trial Court had fixed the case for recording of the evidence. Subsequently, after number of dates, learned trial Court itself recorded an order-sheet that the issues No.4, 5 and 6 are of preliminary in nature and concluded that those issues can be decided as preliminary issues.

10. The sole question which arises for consideration in this appeal is whether learned trial Court was justified in dismissing the suit on the preliminary issues that too on the issue of limitation ?
11. Order XIV of the CPC provides for settlement of issues and determination of suit on issue of law or on issues agreed upon. The relevant provision of Order XIV is reproduced herein below:-

**“ORDER XIV : SETTLEMENT OF ISSUES
AND DETERMINATION OF SUIT ON ISSUES
OF LAW OR ON ISSUES AGREED UPON- 1.**

X X X

X X X

X X X

2. Court to pronounce judgment on all

issues.- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed

of on an issue of law only, it may try that issue first if that issue relates to -

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

12. From bare perusal of Rule 2 of Order XIV of the CPC, it mandates that the Court to pronounce judgment on all issues and in sub-rule(2) of Rule 2 of Order XIV, the powers have been given to the Court to decide the suit on preliminary issues, if the issues is with respect to law only i.e. the jurisdiction of the Court or a bar to the suit created by any law for the time being in force.
13. In the instant case, learned trial Court framed issues considering entire pleadings of the parties along with an issue of limitation. The provision of Rule 2 of Order XIV of the CPC though have specifically provided which issues can be decided as preliminary issues and issue of limitation does not find place in it, because issue of limitation is a mixed question of fact and law both to calculate of the period of limitation, there should be specific pleadings and evidence with respect to period/date when the knowledge of any fact received by the party, which is a fact decided on the basis of evidence of the respective parties.

- 14.** Proceedings initiated by the learned trial Court for deciding the suit on preliminary issues have been considered by the High Court of Chhattisgarh in the matter of **Gyan Ganga Education Academy v. Smt. Suman Dheer**¹, in which, the Hon'ble Court held as under:-

"14. Order XIV Rule 2 before its amendment by the Amending Act of 1976, reads as follows:

"Order XIV Rule 2 - Issues of law and fact. - Where the issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

15. After amendment Order XIV Rule 2 of the CPC reads as follows:

"2. Court to pronounce judgment on all issues.- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and fact arise in the same suit, and the Court is of opinion that the case or any part thereof

¹ (2017) AIRCC 1453

may be disposed of on an issue of law only, it may try that issue first if that issue relates to -

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

16. A comparison of Rule 2 prior to the amendment and as it presently stands now, leaves no manner of doubt that the Legislature in its wisdom has brought about a radical change. Under unamended Rule 2, a duty was cast upon the Court to first decide the issues of law only and postpone the settlement of issues of fact until after the issues of law have been determined and decided. Now, the position is just reverse. The Court under sub-rule (1) of Rule 2 is bound to pronounce judgment on all issues even if the case can be disposed of on the basis of preliminary issue. Sub-rule (2) as now incorporated mandates that if the Court is of the opinion that the case or any part thereof may be disposed of on a issue of law only, it may try that issue first. This is, however, subject to two conditions; firstly that the issue relates to jurisdiction of the Court or secondly the issue relates to a bar to the suit created by any law for the time being in force. Therefore, the only issues which can be treated as preliminary issues are

the issues relating to jurisdiction of the Court and the issue relating to bar of the suit created by a statute. No other issue can be treated as a preliminary issue. Another aspect of this rule is that if the Court forms an opinion that it can dispose of the suit only on the basis of a finding given on a preliminary issue, it should postpone settlement of other issues until after that issue has been determined. What law enjoins is that all issues should not be framed and only issues which can be treated to be preliminary issues in terms of sub-rule (2) should be framed. Even if one was to take slightly more flexible view, it would only mean that when all issues are framed on that very day the Court must determine which of the issues, if any, are to be treated as preliminary issues within the meaning of sub-rule (2) and proceed to treat them as preliminary issues.

19. Dealing with this amendments and its effect, a Full Bench of Himachal Pradesh High Court in CMPMO No. 40 of 2006 (Prithvi Raj Jhingta & Another v. Gopal Singh & Another) held as follows:

"The legislative mandate is very clear and unambiguous. In the light of the past experience that the old Rule 2 whereby, in the fact situation of the trial Court deciding only preliminary issues and neither trying nor deciding other issues, whenever an appeal against the judgment was filed before the Appeal Court and the Appeal Court on finding that the decision of the trial Court on

preliminary issues deserved to be reversed, the case per force had to be remanded to the trial Court for trial on other issues. This resulted in delay in the disposal of the cases. To eliminate this delay and to ensure the expeditious disposal of the suits, both at the stage of the trial as well as at the appeal stage, the legislature decided to provide for a mechanism whereby, subject to the exception created under sub-rule (2), all issues, both of law and fact were required to be decided together and the suit had to be disposed of as a whole, of course based upon the findings of the trial Court on all the issues, both of law and fact.

Based upon the aforesaid reasons therefore, and in the light of legislative background of Rule 2 and the legislative intent as well as mandate based upon such background, as well as on its plain reading, we have no doubt in our minds that except in situations perceived or warranted under sub-rule (2) where a Court in fact frames only issues of law in the first instance and postpones settlement of other issues, under sub-rule (1), clearly and explicitly in situations where the Court has framed all issues together, both of law as well as facts and has also tried all these issues together, it is not open to the Court in such a situation to adopt the principle of severability and proceed to decide issues

of law first, without taking up simultaneously other issues for decision. This course of action is not available to a Court because sub-rule (1) does not permit the Court to adopt any such principle of severability and to dispose of a suit only on preliminary issues, or what can be termed as issues of law. Sub-rule (1) clearly mandates that in a situation contemplated under it, where all the issues have been framed together and have also been taken up for adjudication during the course of the trial, these must be decided together and the judgment in the suit as a whole must be pronounced by the Court covering all the issues framed in the suit. "

- 15.** The Hon'ble Supreme Court in the matter of **Foreshore Cooperative Housing Society Limited v. Praveen D. Desai (Dead) Through Legal Representatives and others²** has considered that under what circumstances, the preliminary issue framed can be decided and the suit can be disposed of on the preliminary issue, and held as under :-

"36. Order 14 Rule 2 of the Code of Civil Procedure, confers power upon the Court to pronounce judgment on all the issues. But there is an exception to that general Rule i.e., where issues both of law and fact arise in the same suit and the Court is of the opinion that the case or any part thereof may be disposed

of on the issue of law, it may try that issue first if that issue relates to the jurisdiction of the Court or a bar to the suit created by any law.

37. Order 14 Rule 2 of the Code of Civil Procedure as it existed earlier reads as under:-

"2. Issues of law and of fact.-Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be "disposed of on the issues of law only, it shall try those issues first and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined".

38. A comparative reading of the said provision as it existed earlier to the amendment and the one after amendment would clearly indicate that the consideration of an issue and its disposal as preliminary issue has now been made permissible only in limited cases. In the un-amended Code, the categorization was only between issues of law and of fact and it was mandatory for the Court to try the issues of law in the first instance and to postpone the settlement of issues of fact until after the issues of law had been determined. On the other hand, in the amended provision there is a mandate to the Court that notwithstanding that a case may be disposed of on a preliminary issue, the Court has to pronounce judgment on all the issues.

The only exception to this is contained in sub-rule (2). This sub-rule relaxes the mandate to a limited extent by conferring discretion upon the Court that if the Court is of opinion that the case or any part thereof may be disposed of "on an issue of law only", it may try that issue first. The exercise of this discretion is further limited to the contingency that the issue to be so tried must relate to the jurisdiction of the Court or a bar to the suit created by a law in force."

- 16.** The issue of limitation is a mixed question of fact and law and the same could not decide as a preliminary issue. The Hon'ble Supreme Court while considering whether issue of limitation could be decided as a preliminary issue or not in the matter of **Kamalakar Eknath Salunkhe v. Baburav Vishnu Javalkar and Others**³, held as under:-

"21. In the instant case, the preliminary issue framed by the trial court is with regard to the question of limitation. Such issue would not be an issue on the jurisdiction of the court and, therefore, in our considered opinion, the trial court was not justified in framing the issue of limitation as a preliminary issue by invoking its power under Section 9-A of the Code. The High Court has erred in not considering the statutory ambit of Section 9-A while approving the preliminary issue framed by the trial court and thus, rejecting the writ petition filed by the appellant."

³ (2015) 7 SCC 321

17. Further, in the matter of **Surjit Kaur Gill and another v. Adarsh Kaur Gill and another**⁴, Hon'ble Supreme Court held as under:-

“10.The issue of limitation is always a mixed question of facts and law, and therefore, it could not be held that no case was made out for proceeding for a trial. Mr. C.A. Sundaram submitted that the respondent No.1 disputed the writing dated 12.2.1991, and it had to be forensically tested.....”

18. Reverting back to the facts of the case in hand, learned trial Court after rejecting the application under Order VII Rule 11 of the CPC, framed issues on the basis of pleadings of the respective parties and thereafter, proceeded for recording of the evidence, then the Court could not have reverted back to decide the suit only on the basis of preliminary issues.
19. Once the Court had proceeded for trial, then the mandate of Order XIV Rule 2 of the CPC is to be followed and learned trial Court is required to pronounce the judgment on all issues, even otherwise preliminary issue, on which, the suit has been dismissed is an issue of limitation which is held by the Hon'ble Supreme Court in umpty number of judgments that it is a mixed question of fact and law, therefore, issue of limitation could not have been decided as a preliminary issue.

4 (2014) 16 SCC 125

- 20.** For the foregoing reasons, the appeal is allowed and judgment and decree passed by the trial Court is set aside. The case is remanded back to the concerned trial Court for deciding the suit afresh on all issues after recording of evidence of the respective parties. Looking to the fact that civil suit has been filed in the year 2006, therefore, learned trial Court is directed to make its all endeavor to decide the civil suit at the earliest.

Sd/-
(Parth Prateem Sahu)
Judge

Yogesh