

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 313 of 2005**

1. Manharan Lal Pandey (since deceased) through Lrs:-

1.1 Smt. Lata Devi, Aged about 82 years, W/o Late Manharan Lal Pandey, R/o Near 24 Bangla, Bharti Nagar, Bilaspur, Tah. & Distt – Bilaspur (C.G.)

1.2 Smt Sarita Shukla, W/o Om Prakash Shukla, Aged about 57 years, W/o Om Prakash Shukla, Aged about 57 years, W/o Om Prakash Shukla, R/o Vill- Khokhsa, Tah. & Dist- Janjgir-Champa (C.G.)

1.3 Smt. Sangeeta Sharma, Aged about 53 years, W/o Rajkumar Sharma, R/o Behind Parsa Shop, Shubhash Nagar, Gondpara, Bilaspur, Tah. & Dist – Bilaspur (C.G.)

1.4 Smt. Aruna Diwan, Aged about 51 years, W/o Satishdhar Diwan, R/o Choubey Colony, House No. 63, Udyan Marg, Raipur, Tah. & Dist- Raipur (C.G.)

1.5 Smt. Karuna Tiwari, Aged about 48 years, W/o Ramakant Tiwari, R/o Vill- Sirosa, Tah. Gondardehi, Dist- Baloda (C.G.)

1.6 Smt. Beena Mishra, Aged about 46 years, W/o Indra Kumar Mishra, R/o Jal Vihar Colony, Near Karmachari Chayan Ayog, Raipur, Tah. & Dist- Raipur (C.G.)

1.7 Smt. Leena Shukla, Aged about 44 years, W/o Late Rakesh Shukla, R/o Bhatribada, Near Ram Temple, Tilak Nagar, Bilaspur, Tah. & Dist- Bilaspur (C.G.)

2. Anil Kumar (since deceased) through Lrs:-

2.1 Manish Pandey, Aged about 35 years, S/o Anil Pandey,

2.2 Smt. Sunanda Devi, Aged about 68 years. W/o Anil Pandey, Both R/o Sundar Nagar, Raipur, Tah. & Dist – Raipur (C.G.)

2.3 Smt. Manisha Mishra, Aged about 32 years, aged about 57 years, R/o Changoribhatha, Raipur, Tah. & Dist- Raipur (C.G.)

3. Sunil Kumar, S/o Manharan Lal Pandey, Aged about -38 years,

4. Akhil Kumar, S/o Manharan Lal Pandey, Aged about -32 years.

All R/o. Village – Sodhar, Tahsil – Mungeli, District Bilaspur (C.G.)

---- Appellants/Plaintiffs

Versus

1. Ashok Kumar Jain, S/o Late Lakhpat Rai, Aged about-40 years, R/o. Lakhpat Baada, Bada Bazar, Mungeli, District – Bilaspur (C.G.)
2. State of Chhattisgarh, Through : The Collector, Bilaspur, District – Bilaspur (C.G.)

---- Respondents/defendants.

For Appellants	:	Mr. Ravindra Sharma, Advocate.
For Respondent No. 1	:	Mr. Ram Kumar Tiwari, Advocate.
For Respondent No. 2	:	Mr. Priyank Rathi, PL

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****23/07/2019**

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

“Whether the First Appellate Court was justified in reversing the judgment & decree of the trial Court holding the suit to be barred by limitation ignoring the fact that neither such plea was raised before the trial Court nor it was tried ?

(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) Original plaintiffs, four in number, instituted a suit for declaration of title and permanent injunction stating that decree be passed in their favour declaring that they are possession and title holder of the suit land and order dated 10.02.1995 passed by the Tahsildar is null and void and sale deed dated 8.6.1983 (Ex.P-4) is not binding upon the plaintiffs as it was executed for security of loan by plaintiff No. 1 in favour of father

of defendant No. 1 namely Late Lakhpat Rai.

(2.2) The trial Court, after the full-dressed trial, decreed the suit holding that sale deed dated 8.6.1983 (Ex.P-4) was executed by plaintiff No. 1 in favour of father of defendant No. 1 namely Late Lakhpat Rai only for security of loan and the said sale deed is not binding on the plaintiffs; and the plaintiffs are title holder of the suit land and granted decree of possession from the defendant No. 1 and subsequent purchaser, if any.

(2.3) Defendant No. 1 preferred first appeal there-against. The first appellate Court affirmed the finding on all the seven issues as recorded by the trial Court but while answering the issue No. 8, which relates to relief and cost, held that plaintiffs' suit was barred by limitation and, therefore, the plaintiffs are not entitled for the relief as claimed and dismissed the suit and now this second appeal under Section 100 of the CPC has been preferred by the appellants/plaintiffs, in which, substantial question of law has been formulated and set-out in the opening paragraph of this judgment.

(3) Learned counsel appearing for the appellants/plaintiffs would submit that the first appellate Court having affirmed all the findings of seven issues as recorded by the trial Court could not have dismissed the suit holding it to be barred by limitation as no plea was raised before the trial Court / Appellate Court and consequently no issue was framed and the plaintiffs was deprived of to defend the said issue as it was neither raised in the suit nor in the appeal and, therefore, judgment and decree of the first appellate court – qua- issue No. 8 are liable to be set aside.

(4) Per contra, learned counsel appearing for respondent No. 1/defendant would submit that the first appellate Court is absolutely justified in dismissing the suit of the plaintiffs as barred by limitation in view of the provisions contained in Section 3 of the

Indian Limitation Act. He would rely upon judgment of the Supreme Court in the matter of Noharlal Verma Vs. District Co-operative Central Bank Ltd., Jagdalpur¹ in support of his submissions.

(5) I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and went through the record with utmost circumspection.

(6) In order to decide the suit filed by the plaintiffs claiming aforesaid reliefs, the trial Court framed as many as seven issues and one issue was framed regarding relief and cost and all the seven issues were answered in favour of the plaintiffs and relief of declaration and possession was granted in favour of the plaintiffs. On an appeal being preferred by defendant No. 1, the first appellate Court has affirmed all the findings qua issues No. 1 to 7 whereas in paragraphs No. 20 & 21, which relate to relief and cost, held that suit of the plaintiffs was barred by limitation and, therefore, they are not entitled for any relief and set aside the judgment and decree of the trial Court.

(7) Section 3 of the Indian Limitation Act, 1963 provides as under :-

“3. Bar of limitation.- (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act-

(a) a suit is instituted-

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official

¹ 2010 (2) C.G.L.J. 50 (SC)

liquidator;

(8) In the matter of **Maqbul Ahmad v. Onkar Pratap Narain Singh**², it was held by the Privy Council, that Section 3 of Limitation Act, 1963 is peremptory and the duty of the court is to notice of the act and give effect to it, even though it is not referred to it in the pleading.

(9) A Constitution Bench of the Supreme Court in the matter of **Ittyavira Mathai v. Varkey Varkey and another**³ drawn a distinction between an erroneous decision on limitation being an error of law which is within the jurisdiction of court and a decision where the court acts without jurisdiction in the following term.

“8. The first point raised by Paikedy for the Appellant is that the decree in OS No. 59 of 1093 obtained by Anantha Iyer and his brother in the suit on the hypothecation bond executed by Ittyavira in favour of Ramalinga Iyer was a nullity because the suit was barred by time. In assuming that the suit was barred by time, it is difficult to appreciate the contention of learned Counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities. Learned Counsel, however, referred us to the decision of the Privy Council in *Maqbul Ahmad v. Onkar Pratap Narain Singh* [AIR (1935) PC 85] and contended that since the court is bound under the provisions of Section 3 of the Limitation Act to ascertain for itself whether the suit before it was within time, it would act without jurisdiction if it fails to do so. All that the decision relied upon says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Code of Civil Procedure. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.”

2 AIR 1935 PC 85

3 AIR 1964 SC 907

(10) The principle of law laid down by their Lordships in the matter of Ittyavira Mathai (supra) was followed with approval in the matter of Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products⁴.

(11) The Supreme Court in the matter of Ittyavira Mathai (supra) did not permit appellant therein to raise question of limitation holding that the plea of limitation is a mixed question of fact and law and it was not raised in specific form by the defendant either in written statement or in appeal by holding as under:-

“ 13.It would thus be clear that the Appellant has not raised a sufficiently clear plea of limitation by stating relevant facts and making appropriate averments. It is apparently because of this that the trial court, though it did raise a formal issue of limitation, gave no finding thereon. Nothing would have been simpler for the trial court than to dismiss the suit on the ground of limitation if the plea was seriously raised before it. Had the point been pressed it would not have been required to discuss in detail the various questions of fact pertaining to the merits of the case before it could dismiss the suit.....
No specific ground has even been taken in the petition made by the Appellant before the High Court for grant of a certificate on the ground that the suit was barred by time. In the circumstances, we decline leave to the Appellant to raise the point of limitation before us..... ”

(12) The Supreme Court in the matter of Noharlal Verma (supra) has clearly held that if the appeal is preferred or application is made after prescribed period , it has to be dismissed even though no such plea has been raised or defence has been set up.

Paragraph 29 of the report states as under :-

“29. Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in absence of such plea by the defendant, respondent or opponent, the Court of authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation.”

(13) Learned counsel appearing for the appellants/plaintiffs would submit that the object and purpose of pleading and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court of its consideration.

(14) The Supreme Court in the matter of Bachhaj Nahar v. Nilima Mandal & others⁵ has held as under:-

“12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also general cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional case where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can

5 AIR 2009 SC 1103

consider such a case not specifically pleaded only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, *suo motu*.”

(15) Reverting to the facts of the case in light of the principles of law laid down by the Supreme Court in the afore-cited case, it is quite vivid that defendant No.1 in his written statement did not take any such plea that the suit is barred by limitation and the parties went to trial on the seven issues framed without any grievance raised obviously for the reason that no plea of limitation was raised by the defendant No. 1 that suit is barred by provisions of Limitation Act, 1963 and the suit was decreed accordingly and, thereafter, the defendant No. 1 preferred first appeal before the first appellate Court under Section 96 of the C.P.C.

(16) Memorandum of appeal preferred under Section 96 of the CPC before the first appellate court would show that even in the memo of appeal, no such plea of limitation was raised and even thereafter, the parties argued the appeal and the first appellate Court affirmed all the findings of the trial court on issues no 1 to 7 but thereafter dismissed the appeal as barred by limitation while deciding the issue No. 8, which relates to cost and relief. If the first appellate Court was of the opinion that the suit is barred by limitation, which the said Court has duty to look into by virtue of provisions contained in Section 3 of the Act, 1963, in that case the said Court ought to have noticed the present plaintiffs and ought to have heard them on the said question of limitation, thereafter, could have recorded a finding on the plea of limitation as this

procedure would have satisfied the principles of natural justice by not taking the plaintiff by surprise but that course was not followed.

(17) The First appellate Court after affirming the findings of the trial Court on issues No. 1 to 7 straightway recorded a finding in the appeal preferred by defendant No. 1 holding the suit to be barred by limitation and thereby entertained a new ground altogether, which was not the case of defendant No. 1 either before the trial Court or before the first appellate court and dismissed the suit of the plaintiffs on that ground. Even otherwise, issue of limitation is a mixed question of law and fact and it could have been decided after framing issues and recording evidence of the parties, which course was not resorted to by the learned first appellate Court making the judgment and decree of the first appellate court to that extent vulnerable and accordingly it is liable to be set aside.

(18) In the result, judgment & decree of the trial Court *qua* issue No.8 as contained in paragraphs 20 & 21 of the judgment & decree of the first appellate Court holding the suit to be barred by limitation is set aside and thereby decree granted by the trial Court as partly affirmed by the first appellate Court is restored. Thus, the plaintiffs' suit stands decreed. Defendant No. 1 will bear his own cost and cost of plaintiff as well.

(19) A decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

