

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.323 of 2009****Judgment reserved on: 23-11-2020****Judgment delivered on: 7-12-2020****Ramwati, D/o Goga, Caste Gond, age 50 years, R/o Village Dumariha,
Police Station Gaurella, Tahsil Pendra Road, District Bilaspur (C.G.)****(Defendant)****---- Appellant****Versus****Samani Bai, Widow of Sohan, Caste Gond, aged about 40 years, Village
Gorakhpur, Police Station Gaurella, Tahsil Pendra Road, District
Bilaspur (C.G.)****(Plaintiff)****---- Respondent**

For Appellant/Defendant: Mr. Rakesh Pandey, Advocate.**For Respondent/Plaintiff: Mr. B.P. Singh, Advocate.**

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Judgment**

1. This second appeal preferred by the defendant / appellant herein was admitted for hearing on 16-7-2020 by formulating the following substantial question of law: -

"Whether the first appellate Court was justified in reversing the judgment and decree passed by the trial Court holding that husband of the plaintiff was the adopted son of late Dayaram by recording a finding which is perverse and contrary to the record?"

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

2. Budu had two sons namely Goga and Dayaram. The defendant is daughter of Goga, whereas plaintiff Samani Bai is wife of Sohan and according to the plaintiff, Sohan is the son of Dayaram, which is seriously disputed by other side. The plaintiff filed suit for

permanent injunction simpliciter stating inter alia that the suit property was purchased by her father-in-law on 6-5-1957 for a cash consideration of ₹ 80/- and he was in possession during his lifetime and after death of her father-in-law Dayaram, Sohan has inherited the property and was in possession of the same and thereafter, Sohan also died and thereafter, she is in possession which was interfered by the defendant in which the defendant claimed declaration of title and sought the relief of possession by filing counter-claim stating that inter alia that Dayaram died issueless, Sohan is not the son of Dayaram, therefore, she being the sole survivor, she would succeed the property of Dayaram. The trial Court dismissed the suit holding that Sohan was not son of Dayaram and the property being of Dayaram, the plaintiff would not succeed to it and the defendant would succeed to the same being the niece of Dayaram which the first appellate Court reversed by holding that Sohan was adopted son of Dayaram against which this second appeal has been preferred in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.

3. Mr. Rakesh Pandey, learned counsel appearing for the appellant herein / defendant, would submit that there is no whisper or any pleading in the plaint filed by the plaintiff or in reply to the counter-claim filed by the defendant in response to the claim of the plaintiff that Sohan was adopted son of Dayaram, yet the first appellate Court reversed the finding of the trial Court holding that Sohan was adopted son of Dayaram, which is wholly perverse to the record particularly when there is no pleading with regard to the claim that Sohan was adopted son of Dayaram. He relied upon the

decisions of the Supreme Court in the matters of Nandkishore Lalbhai Mehta v. New Era Fabrics P. Ltd. and others¹ and Anathula Sudhakar v. P. Buchi Reddy (dead) by LRs. and others² to buttress his submission as the plaintiff was required to seek declaration as there is cloud raised over her title which Sohan being not the son of Dayaram, therefore he has no right, title and interest over the suit property and as such, judgment & decree of the trial Court deserve to be set-aside and that of the trial Court be restored.

4. Mr. B.P. Singh, learned counsel appearing for the plaintiff / respondent herein, vehemently opposing the submission of learned counsel for the appellant / defendant, would submit that the first appellate Court in its well reasoned and well merited judgment has answered the issue and rightly held that Sohan was adopted son of Dayaram, therefore, the plaintiff being widow of Sohan would succeed the property of Dayaram, as such, the parties have already joined the issue and therefore no exception can be taken to the judgment of the first appellate Court. As such, the substantial question of law be answered against the plaintiff and in favour of the defendant.
5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records of both the Courts below with utmost circumspection.
6. Admittedly, Budu had two sons namely Goga and Dayaram. There is no dispute that the defendant is daughter of Goga, but the plaintiff claimed that Sohan was son of Dayaram and she is wife of Sohan. The fact that whether Sohan was son of Dayaram or not is in serious dispute between the parties and consequently, the trial

¹ AIR 2015 SC 3796

² (2008) 4 SCC 594

Court framed issue No.1 as to whether Sohan was son of Dayaram or whether Dayaram died issue-less and returned a finding that Sohan was not son of Dayaram and he (Dayaram) died issue-less. It is the case of the plaintiff that Sohan was son of Dayaram and she being the wife of Sohan would inherit the property held by Dayaram to which the defendant specifically refuted in paragraph 5 of the written statement that Dayaram and his wife Laliya Bai died issue-less and Sohan was not son of Dayaram. Not only this, while filing counter-claim, the defendant also emphatically asserted that Sohan's father was Dauwa, as such, Sohan was not son of Dayaram, but surprisingly, the plaintiff while filing written statement to the counter-claim, in paragraph 6, has simply denied the averment made in paragraph 6 of the counter-claim and did not even specifically deny that Sohan was son of Dayaram and he was not son of Dauwa. In the affidavit filed under Order 18 Rule 4 of the CPC, the plaintiff only said that Sohan was son of Dayaram and in cross-objection paragraph 11, the plaintiff has clearly admitted that Dayaram died issue-less, but in same breath, for the first time, in her evidence in paragraph 11, she introduced the plea that Sohan was the adopted son (*balposhi*) of Dayaram. Thereafter, the plaintiff's other witness Sukhdev Prasad (PW-2), in his affidavit under Order 18 Rule 4 of the CPC, introduced the fact that Dayaram had no issue and Sohan was his adopted son, but in cross-examination paragraph 6, he has also admitted that Sohan was son of Dauwa and Dayaram died issue-less. Similarly, the plaintiff's another witness Baura (PW-3) also said that Dayaram died issue-less and Sohan was son of Dauwa and he was the adopted son (*balposhi*) of Dayaram. As such, the plaintiff and her

witnesses have proved the fact that Dayaram died issue-less and Sohan was not son of Dayaram, as Sohan's father was Dauwa. Thus, it is established on record on the basis of evidence adduced by the plaintiff and her witnesses that Dayaram died issue-less, Sohan was not son of Dayaram and he was son of one Dauwa. This has also been held by the trial Court.

7. Now, the question would be, whether the plaintiff has pleaded and proved the fact that Sohan was adopted son of Dayaram?
8. As stated herein-above, there is no whisper or iota of pleading in the plaint that Sohan was adopted son of Dayaram. The defendant in her counter-claim clearly stated in paragraph 6 that Sohan was son of Dauwa and Dayaram died issue-less, as such, the plaintiff has no right and title over the property, but while filing written statement to the counter-claim, the plaintiff did not think it proper to even assert that Sohan was adopted son of Dayaram and for the first time, the plaintiff in her cross-examination, in paragraph 11, while admitting the fact that Dayaram died issue-less, introduced the plea that Sohan was adopted son (*balposhi*) of Dayaram which was further reiterated by her witnesses Sukhdev Prasad (PW-2) and Baura (PW-3). That is the reason why the trial Court only framed the issue whether Sohan was son of Dayaram or Dayaram died issue-less and returned the finding that Sohan was not son of Dayaram and Dayaram died issue-less, otherwise, the trial Court could have definitely framed an issue, whether Sohan was adopted son of Dayaram. As such, there is absolutely no pleading and consequently no issue raised with regard to the fact of adoption, therefore, the defendant did not have an opportunity to counter the plea that Sohan was adopted

son of Dayaram, but the first appellate Court placed reverse burden on the defendant that though the plaintiff did not say that Sohan is adopted son of Dayaram, but the evidence adduced on behalf of the plaintiff that he was the adopted son of Dayaram, is admissible in evidence.

9. The question for consideration would be, whether the evidence adduced by a party without pleading and without opportunity of hearing to the other side can be looked into in evidence to grant any relief?

10. The Supreme Court in the matter of Bachhaj Nahar v. Nilima Mandal and another³ highlighted the object and purpose of pleadings and issues and held that the object and purpose of pleadings 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. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief and relief can be granted only with reference to the prayers made in the pleadings. It has been observed in paragraph 17 of the report as under: -

“17. 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, contain the necessary averments to make out a particular case and the issues framed also generally

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 cases 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*⁴ and *Ram Sarup Gupta*⁵ 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 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*.”

11. Later on, in Nandkishore Lalbhai Mehta (supra), their Lordships of the Supreme Court taking note of their earlier decision in Bachhaj Nahar (supra), referred the earlier decisions in the matters of Bhagwati Prasad v. Chandramaul⁴ and Ram Sarup Gupta v. Bishun Narain Inter College⁵.

12. Reverting to the facts of the case in the light of the principles of law laid down by their Lordships of the Supreme Court in the aforesaid judgments (supra), it is quite vivid that in the instant case, the only pleading raised and issue framed was, whether Sohan was son of Dayaram or not and whether Dayaram died issue-less which the trial Court answered in favour of the defendant and against the plaintiff by holding that Sohan was not

4 AIR 1966 SC 735

5 AIR 1987 SC 1242

son of Dayaram, as Dayaram died issue-less, but there was no issue raised or it was not covered by the issue already raised that whether Sohan was adopted son of Dayaram or not. For the first time, in the evidence of the plaintiff when she was cross-examined on behalf of the defendant in which she admitted that Dayaram died issue-less, then only the plaintiff introduced the theory of Sohan being the *balposhi* son of Dayaram and it was further supported by other witnesses – Sukhdev Prasad (PW-2) and Baura (PW-3). As such, there is no pleading at all in line with Order 6 Rule 2 of the CPC that party to suit is required to plead material facts in a concise form on which the party relies for his claim or defence as the case may be, but that was not done in this case despite having opportunity at the time of filing written statement to the counter-claim. The plaintiff had an opportunity to clearly plead and prove that Sohan was adopted son of Dayaram and could have proceeded to lead evidence in support of that plea, but she maintained throughout till her evidence on 23-3-2007 that Sohan was biological son of Dayaram, but once it was elicited on behalf of the defendant that Dayaram died issue-less, then only at the same breath, in paragraph 11 of her cross-examination, she introduced the theory of Sohan being the *balposhi* (adopted) son of Dayaram which the first appellate Court considered and relied upon and decreed the suit holding that Sohan was adopted son of Dayaram.

13. In the considered opinion of this Court, in the light of the decision of the Supreme Court in Bachhaj Nahar (supra) as held by their Lordships in paragraph 17 of the report and followed in Nandkishore Lalbhai Mehta (supra), it is quite vivid that in

absence of pleading that Sohan was adopted son of Dayaram, the defendant was deprived of an opportunity to controvert and lead evidence in opposition of that pleading and thus, the first appellate Court is absolutely unjustified in holding that Sohan was adopted son of Dayaram and proceeded to grant decree in favour of the plaintiff. The finding is clearly contrary to the facts and oral and documentary evidence available on record and the well settled legal position as noticed herein-above rendered by their Lordships of the Supreme Court in the aforesaid judgments (supra).

14. As a fallout and consequence of the aforesaid discussion, the judgment and decree of the first appellate Court are set-aside and that of the trial Court are restored. The substantial question of law is answered accordingly.
15. The appeal is allowed to the extent indicated herein-above. No order as to cost(s).
16. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge