
(2014) 05 CHH CK 0007
In the Chhattisgarh High Court
Case No : Second Appeal No. 2 of 2002

Menharan

APPELLANT

Vs

Ghanaram

RESPONDENT

Date of Decision : 02-05-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 100

Citation : (2014) 4 CGLJ 117

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : P.P. Sahu, Advocate for the Appellant; Abhishek Sharma, Y.C. Sharma, Vivek Rathore, Advocates and Sanjeev Agrawal, P.L, Advocate for the Respondent

Judgement

Sanjay K. Agrawal, J.

1. The substantial question of law formulated and to be answered in this plaintiff's second appeal states as under:

"Whether both the Courts below are justified in dismissing the plaintiff's suit as barred by limitation by recording a perverse finding ?"

[For the sake of convenience, the parties will be referred in the instant judgment as were referred in the suit.]

The imperative facts required to be noticed for adjudication of this appeal are as under:

"(1.1) Plaintiff scheduled suit property originally held by two brothers namely Dharmu and late Jagta. Dharmu having share in the suit property sold the land bearing Khasra No. 308/11, area 3.06 acres situated at village Nawagaon, Tahsil Saja, District Durg on 25.5.1968 to plaintiffs for consideration of Rs. 2,000/- and put them in possession.

(1.2) It is further case of the plaintiffs that in the year 1968-1969 plaintiffs

sowed Kodo and thereafter Rahar, which was harvested by defendants and tried to dispose them and, therefore, Civil Suit No. 31-A/70 styled as Sewak Ram & others v. Must. Kunti Bai & another for permanent injunction came to be filed against defendants therein namely Kunti Bai and Ghanaram i.e. widow and son of Jagta. The said civil suit was dismissed by the trial Court on 20.8.1974 finding that the scheduled suit property is the joint family property of Dharmu & Jagta and the present plaintiffs are not possession of the suit land.

(1.3) On appeal being filed by the plaintiffs, first appellate Court in Civil Appeal No. 22-A/1974 (Sewakram & another v. Smt. Kuntibai & another) dismissed the appeal holding that plaintiffs, are the purchaser from the co-parcener, are entitled to enforce their right by suit of partition and suit filed for joint possession much less for injunction is not maintainable. Thereafter, plaintiffs did not take any steps to file the suit as held by first Appellate Court for 15 to 16 years, thereafter, on 21.2.1991 filed the instant suit for declaration of his title and for possession and in alternatively prayed for partition and possession.

(1.4) The trial Court has framed preliminary issues with regard to plea of res judicata and limitation which read as under:--

2. The trial Court, while deciding the preliminary issue by its order dated 18.10.1995, came to the conclusion that instant suit is hopelessly barred by limitation.

3. The plaintiffs preferred first appeal there against. The first appellate court, after re-appreciating the entire evidence adduced in the case, affirmed the judgment and decree passed by the trial court, leading to filing of this Second Appeal under Section 100 of the Code of Civil Procedure by the plaintiffs, which has been admitted on the substantial question of law formulated as mentioned in opening paragraph of this judgment.

4. Shri P.P. Sahu, learned counsel appearing for the appellants/plaintiffs would submit that the concurrent findings recorded by both the courts below holding the suit to be barred by limitation is bad in law as question of limitation being a mixed question of law and fact could not have been decided by trial Court without recording evidence of the parties, and therefore, judgment and decree passed by both the courts below deserve to be set aside.

5. On the other hand, learned counsel appearing for the respondents, while supporting the judgment and decree passed by both the courts below, would submit that the Civil Suit as framed and filed is ex facie barred by limitation and, therefore, both the courts below were justified in dismissing the suit filed by the plaintiffs.

6. I have heard learned counsel appearing for the parties and perused the records of both the courts below with utmost circumspection.

7. The short question that needs consideration by this Court is whether the suit as framed and filed for declaration of title and possession and in alternative suit

for partition and possession was within the period of limitation prescribed by provisions of the Indian Limitation Act, 1963.

8. Learned counsel appearing for the appellants/plaintiffs would submit that in a present suit, period of limitation would be governed by Article 110 of the Limitation Act whereas it was contended by other side that Article 113 of the Limitation Act would be applicable.

9. Sections 110 and 113 of the Limitation Act, 1963 reads as under:--

10. The word "right to sue" employed in Section 113 of the Act would mean a right to seek relief, that is, a right to prosecute by law to obtain relief by means of legal procedure; in other words a "right to sue" accrues when a cause of action arises.

11. The Supreme Court in case of Mst. Rukhmabai Vs. Lala Laxminarayan and Others, after noticing the decision of Privy Council in case of AIR 1930 270 (Privy Council) has held as under :--

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

12. Thus, in absence of specific Article governing the period of limitation in filing the suit for partition, Article 113 of Limitation Act would be applicable and limitation would three years when the right to sue accrues to the party, who is entitled for the partition. In the instant case, plaintiffs have purchased the suit land from Dharmu on 25.5.1968, the suit for permanent injunction i.e. Civil Suit No. 31-A/70 came to be filed by the present plaintiffs and in which cause of action shown is that defendants have harvested the crop of Kodo and Rahar sowed by plaintiffs, that suit was dismissed by the trial Court on 20.8.1974; and the first appeal preferred there-against preferred by the plaintiffs was also dismissed on 28.2.1975 and observed as under:--

"I hold that plaintiff has failed to prove his case. It is now well settled that if the land is transferred by a co-parcener of his share transferee can enforce his right by partition suit alone. Suit for joint possession much less for injunction is therefore not maintainable."

13. A close perusal of the aforesaid observations of the first appellate Court would clearly demonstrate that the first appellate Court finding that the plaintiffs being the purchaser of un-divided interest of the co-parcener, his remedy is to file suit for partition and, therefore, dismissed the suit.

14. Thus, the plaintiffs right to sue for partition within the meaning of Article 113 of the Limitation Act had already accrued, when he filed Civil Suit No. 31-A/70 before the Civil Court claiming permanent injunction which was dismissed by the trial Court and affirmed in the appeal by first appellate Court on 28.2.1975; thus, the plaintiffs having cause of action for filing the suit for partition as held by the first appellate Court in the appeal filed by the plaintiffs, but he did not file any suit for partition inspite of finding recorded by the first appellate Court in earlier suit and filed the instant suit only on 22.02.1991. Thus, it is held that plaintiffs' right to sue for partition had already occurred when the crop sowed by them was harvested in the year 1971, by which he filed suit for permanent injunction erroneously dismissed by the trial Court and the first appellate Court also dismissed the appeal clearly holding that though plaintiffs have cause of action to sue for partition, yet not filed the suit for partition, plaintiffs instead of filing the suit for partition, immediately thereafter, did not take any steps for last 15 to 16 years to file such suit and the suit came to be filed belatedly in the year 1992.

15. The submission of Mr. Sahu, learned counsel appearing for the appellant/plaintiff that question of limitation cannot be decided without recording evidence deserves to be rejected, the Supreme Court in case of Hardesh Ores Pvt. Ltd. Vs. Hede and Company, , has held as under:--

"It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not, must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a paragraph and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The suit filed by the appellants from the statements in the plaint appeared to be barred by the law of limitation and the trial Court as well as the High Court were justified in holding that the plaint deserves to be rejected under Order 7, Rule 11, Civil Procedure Code."

16. Thus, in view of foregoing analysis, the suit filed by the plaintiff for partition on 21.02.1991 is apparently hopelessly barred by limitation and, therefore, the trial Court has not committed illegality in dismissing the suit; and first Appellate Court has also not committed illegality in affirming the same.

17. For the reasons mentioned hereinabove, the appeal being devoid of merit is liable to be and is hereby dismissed. No order as to costs. A decree be drawn up accordingly.