(2019) 09 CHH CK 0166

Chhattisgarh High Court

Case No: Second Appeal No. 297 Of 2004

Public Trust, Ramjanki Mandir Bhatula		APPELLANT
	Vs	
Sahdev Ram And Ors		RESPONDENT

Date of Decision: Sept. 27, 2019

Acts Referred:

- Code Of Civil Procedure 1908 - Section 80, 96, Order 22 Rule 9, Order 22 Rule 9(1), Order 23 Rule 1, Order 23 Rule 1(3), Order 23 Rule 2
- Code Of Criminal Procedure, 1973 - Section 145
- Limitation Act, 1963 - Section 14(1), 14(3)
- Indian Limitation Act, 1877 - Section 5

Hon'ble Judges: Sanjay K. Agrawal, J

Bench: Single Bench

Advocate: Shobhit Mishra, Y.C. Sharma, Anjali Singh Chauhan

Final Decision: Dismissed

Judgement

Sanjay K. Agrawal, J

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by defendant No.2 are as under: -

(1) Whether the finding recorded by the lower Appellate Court that the gift deed executed by Gayatri Bai on 18.12.1952 is void is perverse?

(2) Whether the appeal filed by the respondents was liable to be dismissed as having abated on account of death of Shyam Lal during the pendency of

appeal, his legal representatives having not been brought on record and whether for this reason, the impugned judgment and decree is liable to set

aside?

[For the sake of convenience, parties will be referred in this appeal as per their status shown and ranking given in the plaint before the trial Court.]

2. Smt. Gayatri Bai, wife of Tiro, by registered gift deed dated 18-12- 1952 gifted the property owned by her namely, Ramjanki Mandir situated at

Village Ghatula and the suit land to defendant No.2 / Gram Panchayat, Ghatula - the appellant herein. The said property was later-on declared as

Public Trust (defendant No.2 herein) by the Registrar, Public Trust by order dated 22-7-1975. The two plaintiffs / (two brothers) namely, Sahdev Ram

and Shyamlal claiming the suit property to be the joint family property, firstly, filed Civil Suit No.12-A/1975 in the Court of District Judge, Raipur

stating that Gayatri Bai being limited owner, could not have gifted the suit property in favour of defendant No.2. The said civil suit was dismissed on

17-12-1978 by the said Court finding that Gayatri Bai was empowered to gift the said property in favour of defendant No.2. The plaintiffs therein

preferred first appeal under Section 96 of the CPC before the High Court of Madhya Pradesh questioning the judgment & decree of the trial Court

and that first appeal was dismissed as withdrawn on 18-10-1983 under Order 23 Rule 1(3) of the CPC by the plaintiffs with liberty to them to file a

fresh suit. Thereafter, the instant suit bearing Civil Suit No.55-A/1986 from which this second appeal has arisen, was filed on 13-6-1986 by the two

plaintiffs herein namely, Sahdev Ram and Shyamlal stating inter alia that the suit property with temple was joint family property of the plaintiffs' grand-

fathers - Samaru, Arjun & Tiro who were brothers and after the death of Tiro, Samaru & Arjun have succeeded the suit property as Tiro & Gayatri

Bai died issue-less. It was further pleaded that the suit property including temple has illegally been declared as Public Trust by the order of the

Registrar, Public Trust and the suit property was never the property of Gayatri Bai, widow of Tiro. It was also pleaded that in the proceeding under

Section 145 of the CrPC, the Sub-Divisional Magistrate, Dhamtari declared the possession of defendant No.2 / appellant herein over the suit property

that led to filing of suit stating that cause of action has arisen on 18-10-1983 & 19-12-1984 and the instant suit was filed for declaring the gift deed

dated 18-12-1952 (Ex.D-1) to be void and illegal and for further declaration that defendant No.2 has no legal right and authority over the suit land and

for permanent injunction against defendant No.2 over the suit property restraining with interference in their peaceful possession.

3. The present defendant No.2 filed its written statement opposing the plaint allegations stating that the suit as framed and filed by the plaintiffs is not

maintainable, it is barred by limitation and Public Trust has rightly been created by the order of the Registrar, Public Trust and as such, the suit

deserves to be dismissed.

4. The trial Court upon consideration of oral and documentary evidence on record, dismissed the suit holding that the suit property is not the joint Hindu

family property, the plaintiffs have failed to prove relationship with Gayatri Bai, the gift made by Gayatri Bai in favour of defendant No.2 is not invalid,

Public Trust has rightly been created by the Registrar, Public Trust and the suit as framed and filed has become time barred, and the suit ought to

have been filed within six months from the date of order of registration of defendant No.2 as Public Trust.

5. The two plaintiffs preferred first appeal before the first appellate Court and during the pendency of first appeal, Shyamlal, one of the plaintiffs died.

The first appellate Court by its order dated 24-11- 2001 held that since plaintiff No.2 has died, appeal against him stands abated, but further held that

the appeal filed by plaintiff No.1 would continue and fixed the case for final hearing and thereafter, heard the matter on merits and allowed the appeal

of plaintiff No.1 and set aside the judgment & decree of the trial Court, and granted decree that the gift deed dated 18-12-1952 (Ex.D-1) is illegal and

void and Gayatri Bai has no right to bequeath the suit property by way of gift and consequently, defendant No.2 has not acquired any title by virtue of

the gift deed Ex.D-1 and granted permanent injunction against defendant No.2 / appellant herein. Questioning the judgment & decree passed by the

first appellate Court, this second appeal has been preferred by defendant No.2 in which substantial questions of law have been framed, which have

been catalogued in the opening paragraph of this judgment.

6. Mr. Shobhit Mishra, learned counsel appearing for the appellant herein / defendant No.2, would make following submissions: -

1. The judgment & decree passed by the first appellate Court holding that the gift deed is illegal and void document, is perverse and contrary to

record. Though the M.P. High Court in first appeal preferred by both the plaintiffs permitted the plaintiffs therein to withdraw the suit and appeal with

liberty to file fresh suit on 18-10-1983, but the subsequent suit which was filed and which was the subject matter of this appeal was not based on same

cause of action and therefore it could not have been entertained in light of the provisions contained in Order 23 Rule 1(3) of the CPC and since the

suit subsequently filed was not based on the same subject matter, the first appellate Court could not have entertained and decreed the said suit. He

further relied upon a decision of the Supreme Court in the matter of Vallabh Das v. Dr. Madanlal and others AIR 1970 SC 987 to buttress his

submission. The suit as framed and filed for declaring the gift deed as null and void was apparently barred by limitation, as the first appellate Court

was absolutely unjustified in reversing the well-merited and well-reasoned judgment & decree of the trial Court, as such, the judgment & decree of the

trial Court deserve to be restored by setting aside the impugned judgment & decree.

2. During the pendency of first appeal one of the plaintiffs - 1 plaintiff No.2 Shyamlal died on 9-9-2001 and his LRs were not brought on record within

the time prescribed and consequently, his appeal was declared abated by the order dated 24-11-2001. Therefore, since on account of abatement of

appeal of plaintiff No.2, decree of the trial Court against plaintiff No.2 has attained finality and as such, the decree having attained finality, the appeal

of plaintiff No.1 Sahdev also stands abated. He would rely upon the decisions of the Supreme Court in the matters of Amba Bai and others v. Gopal

and others (2001) 5 SCC 570 and Hemareddi (D) Through Lrs. v. Ramachandra Yallappa Hosmani and others AIR 2019 SC 3297 to buttress his

submission. Therefore, the first appellate Court is absolutely unjustified in granting decree in favour of one of the plaintiffs, whereas the decree against

the other plaintiff has become final by virtue of his appeal having been declared abated by the order of the first appellate Court.

7. On the other hand, Mr. Y.C. Sharma, learned counsel appearing for the plaintiff/respondent No.1(A) herein, would submit that plaintiff No.2

Shyamlal had already relinquished his right over the suit property by making an application before the first appellate Court on 18-6-2001, as he had

expressed his willingness to withdraw from the appeal, therefore, the subsequent declaration that the appeal stands abated against appellant No.2 /

plaintiff No.2 has no legal consequence and the appeal has rightly been decreed by the first appellate Court. He would further submit that Gayatri Bai

had no right over the suit property to make gift by gift deed dated 18-12- 1952 in favour of defendant No.2, therefore, the first appellate Court has

rightly declared the gift deed to be null and void and the suit is well within the period of limitation, as such, this appeal deserves to be dismissed.

8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost

circumspection.

Answer to the first substantial question of law: -

9. The two plaintiffs namely, Sahdev Ram and Shyamlal filed first Civil Suit No.12-A/1975 in the Court of District Judge, Raipur pleading inter alia that

Gayatri Bai had limited right over the suit land and therefore she could not have gifted the property by gift deed dated 18-12-1952 (Ex.D-1) in favour

of the appellant herein / defendant No.2 Trust disclosing the accrual of cause of action on 22-7-1975 which came to be dismissed on 17-12-1978

recoding a finding that Gayatri Bai was empowered to gift the said property and the gift made in favour of defendant No.2 is valid in law which the

two plaintiffs assailed by way of First Appeal No.54/1979 and that appeal as well as suit was permitted to be withdrawn on 18-10- 1983 by the M.P.

High Court with liberty to file the suit afresh (that permission was sought and granted on the ground that the suit will fail by reason of the defect for

want of service of notice under Section 80 of the CPC).

10. Thereafter, the second suit from which this second appeal has arisen, was filed by Sahdev Ram and Shyamlal on 7-10-1985 stating inter alia that

Gayatri Bai had not executed any such gift deed in favour of defendant No.2 / appellant herein on 18-12-1952 and the Panch, Sarpanch and other

villagers got the gift deed executed in absence of Gayatri Bai and got the thumb impression of some other woman holding her to be Gayatri Bai and

the said gift deed was never executed by Gayatri Bai in favour of the appellant / defendant No.2, therefore, the gift deed is void ab initio disclosing the

cause of action to be accrued on 18-10-1983 and 19-12-1984. This suit was dismissed by the trial Court merely on the ground that Gayatri Bai has

rightly gifted the property in favour of defendant No.2 / appellant herein by which defendant No.2 has acquired title over the suit land and the suit as

framed and instituted questioning the gift deed dated 18-12-1952 has become barred by limitation and no notice under Section 80 of the CPC was

served before filing the suit and defendant No.2 / appellant herein is in possession over the suit property and the suit is barred by limitation. The suit

ought to have been brought within six months from declaring the said property as the property of Public Trust by order dated 22-7-1975 having been

published on 23-7-1975 and within six months the suit could have been brought.

11. Now, the question for consideration would be, whether the suit as framed and filed was barred by limitation?

12. The registered gift deed was executed by Gayatri Bai in favour of the appellant herein / defendant No.2 on 18-12-1952 (Ex.D-1) and it has been

sought to be declared illegal. Article 58 of the Limitation Act, 1963 would apply. It states as under: -

Description of suit Period of Time from which period limitation begins to run

58. To obtain any other Three years When the right to sue first declaration. accrues.

13. This Article 58 of the Limitation Act, 1963 (for short, 'the Act of 1963') is a residuary Article relating to declaratory suits, it governs all suits for

declaration which are not covered by any other Article and would not apply to suits covered by Articles 56 and 57 and in terms of Article 58, the

period of limitation would be reckoned from the date on which the cause of action first accrues.

14. Article 58 of the Act of 1963 prescribes the period of limitation of three years commencing when the right to sue first accrues. It is trite law that

limitation would not commence unless there has been a clear and unequivocal threat to infringe the right claimed by the plaintiffs. (See C. Mohd.

Yunus v. Syed Unnissa AIR 1961 SC 808, Rukhmabai v. Laxminarayan AIR 1980 SC 335 and Mt. Bolo v. Mt. Koklan AIR 1930 PC 270).

15. In C. Mohd. Yunus (supra) it was further held by Their Lordships that mere denial by the defendant of the rights of the plaintiffs would not set the

period of limitation running against them. In Mst. Rukhmabai (supra), Their Lordships observed that where there were successive invasions or denials

of right, the right to sue would accrue when the defendant had clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the

suit. Their Lordships also observed as under:-

Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be clear and unequivocal threat so as to

compel him to file a suit, whether a particular threat gives right to a compulsory cause of action depends upon the question whether that threat

effectively invades or jeopardizes the said right.

16. In the matter of Daya Singh and another v. Gurdev Singh (dead) by LRs. and others (2010) 2 SCC 194 Â relying upon C. Mohd. Yunus (supra),

Their Lordships of the Supreme Court have held that mere existence of adverse entry in revenue records does not give rise to cause of action. Cause

of action to sue accrues only when right asserted in suit is infringed or there is threat to infringe that right.

17. Similarly, in the matter of Khatri Hotels Private Limited and another v. Union of India and another (2011) 9 SCC 126 the Supreme Court has

considered the earlier decisions of Rukhmabai's case (supra) and Mt. Bolo's case (supra) and held as under:-

24. The Limitation Act, 1963 (for short, ""the 1963 Act"") prescribes time limit for all conceivable suits, appeals etc. Section 2(j) of that Act defines the

expression ""period of limitation"" to mean the period of limitation prescribed in the Schedule for suit, appeal or application. Section 3 lays down that

every suit instituted, appeal preferred or application made after the prescribed period shall, subject to the provisions of Sections 4 to 24, be dismissed

even though limitation may not have been set up as a defence. If a suit is not covered by any specific article, then it would fall within the residuary

article. In other words, the residuary article is applicable to every kind of suit not otherwise provided for in the Schedule.

30. While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The

word ""first"" has been used between the words ""sue"" and ""accrued"".

This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first

accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be Â Â dismissed if it is

beyond the period of limitation counted from the day when the right to sue first accrued.

18. Reverting to the facts of the present case, the question would be, when the right to sue first accrued in favour of the two plaintiffs for seeking

declaration that the gift deed (Ex.D-1) is illegal and void, for that, two documents Exs.P-1 & P-2 may be referred herein profitably.

19. Ex.P-1 is a document filed by the plaintiffs. It is dated 10-2-1953 by which Sahdev Ram, one of the plaintiffs, has informed to the Tahsildar,

Dhamtari that villagers have got the gift deed executed in absence of Gayatri Bai and got the property of Gayatri Bai registered in their name, that

property is not the exclusive property of Gayatri Bai and therefore action should be taken. Thereafter, Ex.P-2 is the legal notice served by Sahdev

Ram, one of the plaintiffs, along with Gayatri Bai to Sudan, Leelambar Singh Patel, Laxman, Bhagwani Singh and Loknath. That document is also

dated 10-2-1953 claiming that Gayatri Bai had not executed any gift deed. It would be appropriate to refer to the concluding part of the notice by

which the gift is said to have been revoked which states as under: -

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20. The aforesaid two documents would clearly show that Sahdev Ram, one of the plaintiffs was party to Exs.P-1 & P-2 and he was fully aware of

all the facts about the execution of gift deed by Gayatri Bai in favour of defendant No.2 / appellant herein and that is the reason why he along with

Shyamlal brought the first suit i.e. Civil Suit No.12-A/1975 pleading that Gayatri Bai was not empowered to gift the said property in favour of

defendant No.2, as such, all the facts leading to execution of gift deed were in the knowledge of plaintiff No.2 as back as on 10-2-1953 vide Ex.P-1

and on 10-2-1953 - same day, vide Ex.P-2 and thereafter, first suit was instituted by them on 22-7-1975 and was dismissed by the trial Court on 17-12-

1978 and first appeal as well as suit was dismissed as withdrawn on 18-10-1983. As such, right to sue claiming declaration arose in favour of the two

plaintiffs as back as on 10-2- 1953 when they issued notice Ex.P-1 and legal notice Ex.P-2 and they also instituted suit which was ultimately,

dismissed and second suit has also been dismissed as barred by limitation, therefore, they ought to have instituted the instant suit within three years

from 10- 2-1953, as they came to know about the execution of gift deed by Gayatri Bai in favour of defendant No.2.

21. Now, the question would be, whether the period of limitation which the plaintiffs have lost in contesting the first suit from 22-7-1975 and which

was dismissed and first appeal preferred was ultimately permitted to be withdrawn on 18-10-1983 with liberty to file fresh suit under Order 23 Rule

1(3) of the CPC, would be excludable in reckoning the period of limitation of three years by virtue of the provisions contained in Order 23 Rule 2 of

the CPC read with Section 14(3) of the Limitation Act, 1963?

22. Order 23 Rule 1(3) and Order 23 Rule 2 of the CPC provide as under: -

1. Withdrawal of suit or abandonment of part of claim.--xxx xxx xxx (3) Where the Court is satisfied,--

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such

terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of

the subject-matter of such suit or such part of the claim.

2. Limitation law not affected by first suit.--In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound

by the law of limitation in the same manner as if the first suit had not been instituted.

23. A conjoint reading of Order 23 Rule 1 sub-rule (3) and Order 23 Rule 2 of the CPC would reveal that if a fresh suit is instituted upon permission

granted under Order 23 Rule 1(3) of the CPC in respect of the subject-matter of the suit or such part of the claim, the plaintiff shall be bound by the

law of limitation in the same manner as if the first suit has not been instituted. As such, by virtue of Rule 2 of Order 23 of the CPC, the period of

limitation for filing a suit as in the present case for setting aside the gift deed, would be three years and the time spent in instituting civil suit till the

withdrawal of first appeal as on 18-10-1983 would not be excludable and would not be excluded, but by virtue of Section 14(3) of the Limitation Act,

1963, which is an exception to Order 23 Rule 2 of the CPC and thereby Section 14(1) of the Limitation Act, 1963 would apply.

24. In order to consider the said plea, it would be appropriate to notice Section 14(3) of the Limitation Act, 1963 which reads as under: -

14. Exclusion of time of proceeding bona fide in court without jurisdiction.--(1) In computing the period of limitation for any suit the time during which

the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the

defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of

jurisdiction or other cause of a like nature, is unable to entertain it.

(2) xxx xxx xxx (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of

sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is

granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.-- For the purposes of this section,--

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it

ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

25. A studied perusal of Section 14(3) of the Limitation Act, 1963 would show that Section 14(3) of the Limitation Act, 1963 is a proviso to Rule 2 of

Order 23 of the CPC and the benefit of exclusion of time as contained in Section 14(1) of the Limitation Act, 1963 would be applicable in a fresh suit

instituted on permission granted by the Court under Rule 1 of Order 23 of the CPC where permission is granted by such reason of defect in

jurisdiction or other cause of a like nature.

26. In order to attract Section 14(1) of the Limitation Act, 1963, three conditions are necessary (1) that the plaintiff must have prosecuted the earlier

civil proceeding with due diligence; (2) the former proceeding must have been prosecuted in good faith in a court which from defect of jurisdiction or

other cause of a like nature was unable to entertain it; and (3) the earlier proceeding and the later proceeding must be based on the same cause of

action.

27. Now, the question is, what is the meaning of ""defect of jurisdiction"" and ""or other cause of a like nature"" enumerated in Section 14 (3) of the

Limitation Act, 1963?

28. The Supreme Court in the matter of Gurdit Singh and others etc. v. Munsha Singh and others etc. AIR 1977 SC 640 with reference to Section

14(1) of the Limitation Act, 1963 which also employs the similar phrase ""defect of jurisdiction"" held that ""defect of jurisdiction"" means that the defect

must have been of an analogous character barring the court from entertaining the previous suit and observed as under: -

17. Now the words ""or other cause of a like nature

which follow the words ""defect of jurisdiction"" in the above quoted provision are very important. Their scope has to be determined according to the

rule of Ejusdem Generis. According to that rule, they take their colour from the preceding words ""defect of jurisdiction"" which means that the defect

must have been of an analogous character barring the court from entertaining the previous suit. A Full Bench of the Lahore High Court consisting of

Harries C.J., Abdur Rahman, J and Mahajan J. (as he then was) expressed a similar view in Bhai Jai Kishan Singh v. People Bank of Northern India,

(AIR 1944 Lah

136) (FB) (supra).

29. Thereafter, in the matter of Zafar Khan and others v. Board of Revenue, U.P., and others AIR 1985 SC 39, with reference to Section 14(1) of the

Limitation Act, 1963, Their Lordships of the Supreme Court held as under: -

14. ... It is true that where the expression as a whole reads 'from defect of jurisdiction or other cause of a like nature is unable to entertain it', the

expression 'cause of a like nature' will have to be read ejusdem generis with the expression 'defect of jurisdiction'. So construed the expression 'other

cause of a like nature' must be so interpreted as to convey something analogous to the preceding words 'from defect of jurisdiction'. The defect of

jurisdiction goes to the root of the matter as the Court is incompetent to entertain the proceeding. The proceeding may as well fail for some other

defect. Not all such defects can be said to be analogous to defect of jurisdiction. Therefore the expression 'other cause of a like nature' on which

some light is shed by the Explanation (C) to Sec. 14 which provides ""misjoinder of parties or causes of action shall be deemed to be a cause of like

nature with defect of jurisdiction"", must take its colour and content from the just preceding expression, 'defect of jurisdiction'. Prime facie it appears

that must be some preliminary objection which if it succeeds, the Court would be incompetent to entertain the proceeding on merits, such defect could

be said to be 'of the like nature' as defect of jurisdiction. Conversely if the party seeking benefit of the provision of Sec. 14 failed to get the relief in

earlier proceeding not with regard to anything connected with the jurisdiction of the Court or some other defect of a like nature, it would not be entitled

to the benefit of Sec. 14. Where, therefore, the party failed in the earlier proceeding on merits and not on defect of jurisdiction or other cause of a like

nature, it would not be entitled to the benefit of Sec. 14 of the Limitation Act. See India Electric Works Ltd. v. James Mantosh (1971) 2 SCR 397 :

(AIR 1971 SC 2313).

30. In the matter of Deena (Dead) Through LRs. v. Bharat Singh (Dead) Through LRs. and others (2002) 6 SCC 336, the Supreme Court while

dealing with Order 23 Rule 2 of the CPC read with Section 14(3) of Â Â the Limitation Act, 1963, held that Section 14(3) of the Limitation Act, 1963

is in the nature of a proviso to Order 23 Rule 2 of the CPC. It was observed as under: -

13. From the provisions it is clear that it is in the nature of a proviso to Order 23 Rule 2. The non obstante clause provides that notwithstanding

anything contained in Rule 2 of Order 23 of the Code of Civil Procedure the provisions of sub-section (1) of Section 14 shall apply in relation to a fresh

suit instituted on permission granted by the court under Rule 1 of Order 23. For applicability of the provision in sub-section (3) of Section 14 certain

conditions are to be satisfied. Before Section 14 can be pressed into service the conditions to be satisfied are: (1) both the prior and subsequent

proceedings are civil proceedings prosecuted by the same party; (2) the prior proceeding had been prosecuted with due diligence and good faith; (3)

the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature; (4) the earlier proceeding and the later proceeding

must relate to the same matter in issue; and (5) both the proceedings are in a court.

Thereafter, Their Lordships further considered the meaning of expressions ""defect of jurisdiction"" and ""or other cause of a like nature"" and held as

under: -

15. The other expressions relevant to be construed in this regard are ""defect of jurisdiction"" and ""or other cause of a like nature"". The expression

defect of jurisdiction"" on a plain reading means the court must lack jurisdiction to entertain the suit or proceeding. The circumstances in which or the

grounds on which, lack of jurisdiction of the court may be found are not enumerated in the section. It is to be kept in mind that there is a distinction

between granting permission to the plaintiff to withdraw the suit with leave to file a fresh suit for the same relief under Order 23 Rule 1 and exclusion

of the period of pendency of that suit for the purpose of computation of limitation in the subsequent suit under Section 14 of the Limitation Act. The

words ""or other cause of a like nature"" are to be construed ejusdem generis with the words ""defect of jurisdiction"", that is to say, the defect must be of

such a character as to make it impossible for the court to entertain the suit or application and to decide it on merits. Obviously Section 14 will have no

application in a case where the suit is dismissed after adjudication on its merits and not because the court was unable to entertain it.

Their Lordships have clearly held that Section 14 of the Limitation Act will have no application in a case where the suit is dismissed after adjudication

on its merits and not because the court was unable to entertain it.

31. The Delhi High Court also in the matter of Anil Partap Singh Chauhan v. M/s. Onida Savak Ltd. etc. AIR 2003 Delhi 252 has clearly held that

where the party failed in the earlier proceedings on merit and not on defect of jurisdiction or other causes of a like nature, it would not be entitled to

the benefit of Section 14 of the Limitation Act.

32. Reverting to the facts of the present case in light of the proposition of law noticed herein-above laid down by Their Lordships of the Supreme

Court and the Delhi High Court in the aforesaid judgments (supra), it is quite vivid that in the present case, first suit of the plaintiffs filed seeking the

gift made by Gayatri Bai as invalid and void, was dismissed on merits holding that original holder of the land Gayatri Bai was empowered to make gift

in favour of defendant No.2 / appellant herein and also that the gift was validly executed and the suit as framed and instituted by the plaintiffs was

barred by limitation and also barred by the provisions of the Public Trust Act, as it was not brought within the period of limitation stipulated for

instituting suit against a registered Public Trust under the Public Trust Act. Even otherwise, admittedly, the suit was not dismissed on technical ground

that it is barred by certain provisions of the Act, though the suit and the first appeal preferred by the plaintiffs were allowed to be withdrawn with

liberty to file fresh suit. Therefore, Order 23 Rule 2 of the CPC would operate and the plaintiffs would not be entitled for exclusion of time spent in

filing Civil Suit No.12-A/ 1975 from 22-7-1975 till 18-10-1983 (the date on which the first appeal was permitted to be withdrawn). The plaintiffs have

to plead and establish that the suit as framed and filed was within the period of limitation as per Article 59 of the Limitation Act, 1963 and admittedly,

on 10-2-1953, one of the plaintiffs Sahdev Ram had knowledge about the fact entitling him to have the gift deed declared illegal which he admittedly,

firstly, filed on 22-7-1975 and ultimately, it was dismissed on 14-12-1978 and first appeal was withdrawn and second civil suit was filed on 7-10-1985

after the leave of the M.P. High Court to file fresh suit, though the order of the M.P. High Court granting permission to file fresh suit was brought to

the notice only before the first appellate Court. Therefore, in the considered opinion of this Court, the suit as framed and filed against the gift deed

dated 18-12-1952 on 7-10- 1985 when plaintiff No.1 had knowledge about the facts entitling him to have the gift deed declared illegal as per Exs.P-1

& P-2, then the suit as per Article 59 of the Limitation Act, 1963 was hopelessly barred by limitation, now filed on 7-10-1985. Therefore, the trial

Court is absolutely justified in dismissing the suit as barred by limitation and as such, the first appellate Court ought not to have interfered with the said

judgment & decree by granting decree in favour of the plaintiffs and is unjustified in holding that the gift made by Gayatri Bai in favour of defendant

No.2 is void. The first substantial question of law is answered against the plaintiffs and in favour of defendant No.2.

Answer to the second substantial question of law: -

33. The suit filed by the two brothers / two plaintiffs namely, Sahdev Ram and Shyamlal for declaring the gift deed dated 18-12-1952 executed by

Gayatri Bai as void and illegal and further for declaration that the appellant herein / defendant No.2 has no legal authority over the suit land and also

for permanent injunction against the appellant herein / defendant No.2 restraining from interfering with their possession, was dismissed on merits on

18-4- 2001 against which those two brothers filed first appeal before the first appellate Court. During the pendency of first appeal, plaintiff No.2

Shyamlal died on 9-9-2001 and his legal representatives were not brought on record within the period of limitation prescribed, as the application for

bringing his legal heirs on record was not moved by other plaintiff / appellant herein Sahdev Ram and the first appellate Court by order dated 24-11-

2001 held that since plaintiff No.2 has died, therefore, the appeal against him stands abated. Paragraph 3 of the order dated 24-11-2001 states as

under: -

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34. The question would be, whether the appeal having been declared abated against one of the plaintiffs (plaintiff No.2 Shyamlal), the further finding

of the first appellate Court by the impugned judgment that the appeal as a whole has not abated, is in accordance with law, as decree (dismissal of

suit) against one of the plaintiffs (plaintiff No.2 Shyamlal) has become final on account of his appeal having been abated?

35. Order 22 Rule 9 of the CPC provides as under: -

9. Effect of abatement or dismissal.--(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of

action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent

plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from

continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-rule (2).

Explanation.--Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in

the suit which had abated or had been dismissed under this Order.

36. Under sub-rule (1) of Rule 9 of Order 22 of the CPC, a fresh suit is barred when a suit abates as is dismissed for non-substitution of legal

representatives of any of the deceased parties. The abatement of suit does not deprive the unsuccessful plaintiff of his bundle of rights. It merely

debars him from filing suit again on the same cause of action.

37. In the matter of Mst. Bibi Rahmani Khatoon and others v. Harkoo Gope and others (1981) 3 SCC 173 Their Lordships of the Supreme Court

Â indicated the effect of abatement as under: -

10. The concept of abatement is known to civil law. If a party to a proceeding either in the trial Court or any appeal or revision dies and the right to

sue survives or a claim has to be answered, the heirs and legal representatives of the deceased party would have to be substituted and failure to do so

would result in abatement of proceedings. Now, if the party to a suit dies and the abatement takes place, the suit would abate. If a party to an appeal

or revision dies and either the appeal or revision abates, it will have no impact on the judgment, decree or order against which the appeal or revision is

preferred. In fact, such judgment, decree or order under appeal or revision would become final. Such is not the scheme of abatement as conceived by

Section 4 of the Act. Here, if the abatement as is conceptually understood in the Code of Civil Procedure is imported, it will do irreparable harm. To

illustrate, if an appeal abates rendering either the trial Court judgment or the judgment in first appeal final and binding, the consolidation authorities

would also be bound by it and the party whose appeal or revision abated would lose its chance of persuading the appellate or revisional authority to

accept its case which may result in interfering with or setting aside the judgment, order or decree in appeal. Such was not and could not be the

intention of Section 4. This becomes manifestly clear from the proviso to clause (c) of Section 4 extracted hereinabove which shows that such

abatement shall be without prejudice to the rights of the person affected to agitate the rights or interest in dispute in the suit or proceeding before the

appropriate consolidation authorities under and in accordance with the provisions of the Act. No one would, therefore, stand to suffer on account of

the abatement because there is a special forum carved out for adjudication of the rights which were involved in proceedings which would abate as a

consequence of the notification under Section 3. If the construction as canvassed for were to be adopted it would result in irreparable harm and would

be counter- productive. The consolidation work would be wholly hampered and a party whose appeal is pending would lose the chance of convincing

the appellate Court which, if successful, would turn the tables against the other party in whose favour the judgment, decree or order would become

final on abatement of the appeal. Therefore, the legislature intended that not only the appeal or revision would abate but the judgment, order or decree

against which the appeal is pending would also become non est as they would also abate and this would leave consolidation authority free to adjudicate

the claims of title or other rights or interest in land involved in consolidation. In our opinion, therefore, the High Court was right in not only holding that

the second appeal pending before it abated but also the judgment and decree of the trial Court and first appellate Court would stand abated along with

those proceedings. We reach this conclusion on the language of Sections 3 and 4 and the scheme of the Act but the view which we are taking is also

borne out by some decisions though in none of them this position was directly canvassed.

38. The principle of law laid down in Mst. Bibi Rahmani Khatoon (supra) was followed with approval in a subsequent decision by the Supreme Court

in the matter of Amba Bai (supra) and it was held that the doctrine of merger arises only when there are two independent things and the greater one

would swallow up or may extinct the lesser one by the process of absorption. Their Lordships further held the consequence of abatement as under: -

6. The various provisions contained in Order 22 CPC explain the consequences of death of parties in a civil litigation. If one of the plaintiffs dies and

if the cause of action survives his legal representatives have got a right to come on record and to continue the proceedings. If the sole plaintiff dies

and if the legal representatives are not brought on record, the suit will abate and Rule 9 of Order 22 CPC specifically prohibits the filing of a fresh suit

on the same cause of action. The only remedy available to the legal representatives is to get themselves impleaded and continue the proceedings, if the

suit is already not abated, and if abated, they have to file an application to set aside abatement also.

39. Very recently, in Hemareddi (supra), the Supreme Court while dealing with abatement held that abatement of appeal as a whole, is proper since

allowing appeal would lead to inconsistent appellate decree with one which become final against deceased brother of the appellant. In that case, the

appellant and his late brother sued as plaintiffs for a declaration that the first defendant was not the adopted son and he has no rights in the property

and one of the brothers died during the pendency of appeal and legal representative(s) of his brother were not brought on record on his death and

abatement order in respect of him was not set aside. Their Lordships held that that their claims were not distinct claims and abatement of appeal as a

whole is proper, as allowing appeal would lead to inconsistent appellate decree with one which become final against deceased brother of the appellant

therein. Their Lordships posed following questions for consideration in paragraph 17: -

17. Is this a case when the appellant and his brother were having distinct and independent claims and rights and for the sake of convenience they had

joined as plaintiffs originally in the suit and as appellants subsequently in the appeal? Is this a case where there is joint decree or is it is a case where

the decree is severable? Is it therefore a severable decree or a combination of two decrees? Whether the decree if passed by the appellate court in

favour of the appellant would result in a decree which is contradictory to the decree passed by the trial Court.

Their Lordships answered the questions so posed for consideration as under: -

18. In this case, undoubtedly as we have noted the appellant and his late brother sued as plaintiffs for a declaration that the first defendant was not

the adopted son and he has no rights. They also sought a prohibitory injunction. The suit stood dismissed by trial court. Let us take the converse

position. Assuming that the suit was decreed by the trial court and appeal was carried by the defendants, and pending the appeal by the defendants, if

the late brother of the appellant had died and if the defendants had not impleaded the legal representatives of late brother and the appeal abated as

against him, would it then not open to the appellant as respondent in the appeal to contend that if the appeal was to be allowed to proceed in the

absence of the legal representatives of his late brother and succeed, there would be an inconsistent decree. On the one hand, there will be a decree by

the trial Court declaring that the first defendant was not the adopted son and had no interest in the property qua the late brother of the appellant. On

the other hand, the appellate court could be invited to pass a decree which should be to the effect that the first defendant was found to be the adopted

son and had right and interest over the property and a declaration to that effect would have to be granted.

Would not the appellate court then have to necessarily hold though the decree in favour of the deceased brother of the appellant has become final, and

under it, a declaration is granted that the defendant No.1 is not the adopted son and he has no right to claim the property and there is an injunction

against him that he is the adopted son opposed to the decree which has been passed by the trial court which has attained finality. We would think that

the appellate court would indeed have to refuse to proceed with the appeal on the basis that allowing the appeal by the defendants would lead to an

appellate decree which is inconsistent with the decree which has become final as against the deceased brother of the appellant.

19. We would think that the situation cannot be any other different, when we contemplate the converse of the aforesaid scenario which happens to be

the factual matrix obtaining in this case. The right which was set up by the appellant along with his late brother was joint. They were members of the

joint Hindu family consisting of their late father and which consisted of late Govindareddi, their father Shriram Reddy and Basavareddi, who was none

other than the husband of the second defendant. This is not a case where their claims were distinct claims. This is not the situation which was present

in the case dealt with by the Constitution Bench under the land acquisition case. Therein, several persons came together and sought relief in one

proceeding. We would think that this is not the position in this case.

20. It may be true that if a separate suit had been filed by the late brother and it had abated on his death, there will be no decree on merits and the suit

would have abated. No doubt, it could be argued that even though the appellant and his late brother set up the case of joint right, it would only mean

that they are co-owners of the property, and therefore, they had independent rights as co-owners which could be canvassed in two different

proceedings, and therefore, the decree of the trial court dismissing the suit be treated as two different decrees - one decree against the appellant and

the other against his late brother. Even then, the decree, which the High Court would be invited to pass, would be contradictory and inconsistent with

the decree as against late brother of the appellant which may not be permissible in law.

21. The decree, which the appellant, if successful in the appeal, would obtain, would be absolutely contrary to the decree which has also attained

finality between his late brother and the defendants. They are mutually irreconcilable, totally inconsistent. Laying one side by side, the only impression

would be that one is in the teeth of the other. In one, the suit is dismissed whereas in the other, the suit would have been decreed.

22. The argument that in view of the order passed on 10/09/2001 by which despite the death of late brother of the appellant, permission to prosecute

the appeal was granted by the court there would arise an estoppel against the order being passed holding that the appeal has abated as a whole,

cannot be accepted. The impact of death of the late brother of the appellant qua the proceeding is one arising out of the incompatibility of a decree

which has become final with the decree which the appellant invites the appellate court to pass. In such circumstances, the mere fact that the appellant

was permitted to prosecute the appeal by an interlocutory order would not be sufficient to tide over the legal obstacle posed by the inconsistent decree

which emerges as a result of the failure to substitute legal representative of the late brother and the abating of the appeal filed by his late brother.

Consequently, we see no merit in the appeal. It is accordingly dismissed.

40. Reverting to the facts of the present case, it is quite vivid that the principles of law laid down in Hemareddi (supra) squarely applies to the facts of

the present case. As already noticed herein, in the instant case, the suit was jointly filed by two brothers / two plaintiffs namely, Sahdev Ram and

Shyamlal for declaring the gift deed dated 18-12-1952 in favour of defendant No.2 illegal and for declaring that defendant No.2 has no legal authority

over the suit land claiming joint title over the suit land which was dismissed by the trial Court and they preferred an appeal jointly and during the

pendency of appeal, one of the brothers Shyamlal died on which the appeal was declared abated by order dated 24-11-2001 and that decree against

one of the plaintiffs Shyamlal has become final, as abatement was not set-aside. They (brothers) have claimed the property to be the joint family

property and they being the members of joint family property consisting of Late Jagat, Jagannath, Harlal, Shivlal and their father Samaru, claimed the

subject-matter of the property to the ancestral joint family property. As such, their claim was joint and indivisible. Thus, as on today, suit against one of

the plaintiffs Shyamlal has been dismissed finally having been declared abated by the order of the first appellate Court dated 24-11-2001 and till this

date, abatement has not been set-aside and that decree has become final, if the part of decree of the first appellate Court in favour of plaintiff Sahdev

Ram is allowed to stand, the position which emerges-out is, suit against one of the plaintiffs Shyamlal is dismissed having abated and attained finality,

whereas suit of Sahdev Ram (another plaintiff) has been decreed, then both the decrees one dismissing the suit and another decreeing the suit, would

be irreconcilable and irrevocable, conflicting and contradictory decrees which in my considered decision and in light of the principle of law laid down in

Hemareddi (supra) cannot stand together being squarely applicable to the facts of the present case. As such, the first appellate Court is absolutely

unjustified in holding that the appeal has abated in part and it is accordingly held that the first appeal had abated in toto and it is declared accordingly.

41. As a fallout and consequence of the aforesaid analysis, the judgment of the first appellate Court is set aside on merits as well as appeal had

already abated and in consequence thereof, the judgment & decree of the trial Court is restored and the suit would stand dismissed. The substantial

questions of law are answered accordingly. The second appeal is allowed. No order as to cost(s).

42. Decree be drawn-up accordingly.