

**HIGH COURT OF TRIPURA
AGARTALA**

RSA No.12 of 2023

Sri Abdul Hamid,

Son of Abdul Basid, Resident of Vill.- Nurpur, PO & PS- Kailashahar,
District-Unakoti, Tripura. (Age-38 years)

----Appellant(s)

Versus

1. Sri Nripendra Nath,

Son of Late Harendra Chandra Nath, Resident of Rabindranagar,
Kanchanpur, North Tripura, Pin-799270.

2. Sri Rabindra Chandra Nath,

Son of Late Harendra Chandra Nath, Resident of PO & Vill.-
Kumarghat, District-Unakoti, Tripura, Pin-799264.

3. Sri Shashanka Nath,

Son of Late Harendra Chandra Nath, Resident of PO & Vill.-
Kumarghat, District-Unakoti, Tripura, Pin-799264.

4. Sri Nabasis Nath,

Son of Nripendra Nath, Resident of Rabindranagar, Kanchanpur,
North Tripura, Pin-799270.

-----Principal Respondent(s)

5. Sri Subhash Koyri,

Son of Sri Sitaram Koyri, Care of Manager, Mahabir Tea Estate,
Resident of Ganganagar, Kamalpur, Tripura, Pin-799285.

6. Smt. Kalyani Debnath,

Daughter of Bamacharam Debnath, Resident of Sonai road,
Silchar-6, PO-Silchar-6, PS-Silchar, Cachar, Assam, Pin-788005.

----Proforma Respondent(s)

For Appellant(s)	:	Ms. A. Debbarma, Advocate.
For Respondent(s)	:	Mr. S. Bhattacharjee, Advocate. Mr. A. Sengupta, Advocate.
Date of hearing	:	28th November, 2023.
Date of pronouncement of Judgment	:	21st December, 2023.
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE S.D. PURKAYASTHA
JUDGMENT & ORDER

The appeal arises from the judgment dated 03.02.2023 and consequent decree thereof passed by the Additional District Judge, North Tripura, Dharmanagar in Money Appeal No.03 of 2017.

[2] The present four principal respondents as plaintiffs filed MS No.02 of 2015 in the Court of Civil Judge (Sr. Division), North Tripura, Dharmanagar against the present appellant and proforma respondents as the defendants with a money claim of Rs.18,00,000/- on the ground that as a matter of joint family business they have one business unit namely, M/S Mahanam Bricks Industries at Kanchanpur, wherefrom the appellant (plaintiff no.1) on the basis of an oral agreement made on 28.01.2010 procured bricks and pickets with condition that the payment will be made by him as per prevailing market rate of that time, on weekly basis, specially on Sunday, and total payment should be cleared by 15.02.2010. The total supply, as alleged, was made by the plaintiffs from the period 28.01.2010 to 09.04.2010 for total Rs.22,96,117/- out of which the appellant paid only Rs.9,85,000/- and balance amount remained to the tune of Rs.13,11,112/-.

[3] As further averred in the plaint, thereafter a written agreement was executed between plaintiff-respondent No.1, defendant No.1 (appellant) and defendant No.2 (pro. respondent

no.5) on 28.10.2010 where both the defendants No.1 and 2 admitted the fact of previous such oral agreement and transaction and the fact of failure on the part of defendant No.1 to make the payment. It was also further agreed that the total Rs.13,11,112/- would be cleared on the date of said agreement itself and accordingly the defendant No.1 issued four cheques totaling Rs.13,00,000/- in presence of witnesses. It is also further grievance of the plaintiffs that when four cheques were deposited in the bank, same was dishonoured on the ground that the signature differed. Thereafter, the plaintiff No.1 issued advocate notice to the defendant No.1 on 24.02.2011 demanding such payment. The defendants No.1 and 2 then jointly wrote a letter to defendant No.3 (pro. Respondent no.6) authorizing the plaintiff No.1 to receive bill amount of maintenance works of two roads which were in the name of defendant No.3, so that the plaintiff No.1 can realize said amount along with the cost of further supply of bricks and pickets as made later on. Simultaneously, defendant No.1 also wrote a letter in reply of the said notice to the plaintiff No.1 denying his any sort of liability towards plaintiff No.1 on the ground that defendant No.3 had already revoked his power of attorney and stopped making payment even to defendant No.1 against the works done by him on behalf of defendant No.3 in relation to those contract works.

[4] Thereafter, the plaintiff No.1 filed MS No.10 of 2012 before the Court of Civil Judge (Sr. Division), North Tripura, Dharmanagar

for realization of Rs.18,00,000/- but said suit was dismissed vide order dated 06.06.2014 being barred under Section 69(2) of the Partnership Act, 1932 on the ground that the deed of partnership was not a registered one, and the plaint was accordingly rejected under Order VII Rule 11, CPC.

[5] Thereafter again, said plaintiff No.1 along with other plaintiffs who were proforma respondents in the previous suit filed the present suit bearing No.MS 02 of 2015 with similar claim of Rs.18,00,000/- (Rs.13,00,000/- as principle amount and Rs.5,00,000/- as compensation for loss of business, mental agony etc.). The cause of action for the suit has been claimed to have been arisen on 24.02.2010, 04.04.2010, 28.10.2010, 29.10.2010, 30.08.2011 and lastly on 06.06.2014 when the plaint of the previous suit was rejected. The subsequent suit has been filed on 03.04.2015.

[6] After institution of the subsequent suit, again trial Court framed the preliminary issue on the point of maintainability of the suit and rejected the plaint vide order dated 02.06.2017 under Order VII Rule 11, CPC mainly on the ground that the present suit was barred by limitation as an artificial cause of action on 06.06.2014 for the suit as shown by the plaintiffs (i.e. the date of rejection of previous suit) cannot be treated to be any date of actual cause of action and therefore the suit was time barred. The second reason of

such rejection was that the plaintiffs in previous suit stated that their business entity was an unregistered partnership firm whereas now in the present suit they have deviated themselves from such story and brought a new story that said business concern was their joint family business and plaintiff No.1 was the 'Karta' thereof. Therefore, such contradictory assertion cannot be accepted. Third ground of such plaint rejection was that the suit was barred by principle of *res-judicata*.

[7] When the said order was challenged in Money Appeal No.03 of 2017, the Additional District Judge observed that as per Order XIV Rule 2 of the CPC, judgment was required to be pronounced on all issues and that the suit could be disposed of by framing preliminary issue only when the same would be covered by the provision of Order XIV, rule 2(2), CPC. The first Appellate Court also observed that without framing issue on the point of *res-judicata*, the trial Court erred in holding same to be barred by Section 11 CPC. Said first Appellate Court further went to observe that the provision of Order VII Rule 6, CPC regarding exemption of period of limitation in instituting the suit might also be helpful for the plaintiff inasmuch as, the plaintiffs had categorically claimed such exemption on the ground of health issues and it was therefore a matter to be decided after evidence was recorded. Finally, the first Appellate Court remanded the suit again to the trial Court for framing proper issues

basing on the pleadings of the parties and to pass fresh judgment discussing on all the issues.

[8] The second appeal has been admitted on the following three substantial questions of law:

(i) Whether the order passed by the learned first appellate Court remitting the matter back to the learned trial Court is perverse?

(ii) Whether the suit is barred by the principles of res-judicata or constructive res-judicata?

(iii) Whether the suit is barred by the law of limitation?

[9] Ms. A. Debbarma, learned counsel for the appellant argued that after the previous suit was dismissed, again subsequent suit was filed with the same bundle of facts and same cause of action and between the same parties, therefore, it was hit by Section 11 of the Code of Civil Procedure. She also added that the four numbers of cheques were bounced in the year 2010 and the suit was insituted only on 2015 and therefore it was also barred by law of limitation. Therefore, according to her, the findings of the trial Court was sound and proper but the first Appellate Court committed serious error in remanding the matter for full fledged trial.

[10] Mr. S. Bhattacharjee, learned counsel for the principal respondent-plaintiffs tried to refute that the trial Court in the previous suit gave clear finding that the principal defendants had admitted the dues but only on the ground of violation of Section 69 of the Partnership Act, 1932, the suit was dismissed, but the business was actually a joint family business therefore there would be no applicability of Partnership Act in the present suit. He also pointed out that even after the oral agreement, there was a written agreement executed between the parties wherein there was admission of the defendants about their previous dues. Finally, Mr. Bhattacharjee, learned counsel submitted that the first Appellate Court rightly remanded the case for fresh trial on all issues as reliefs claimed in the subsequent suit was different than the reliefs claimed in the previous suit, and the cause of action of subsequent suit also lastly arose on 06.06.2014 and therefore the suit was not time barred.

[11] Among all the three substantial questions of law as formulated and indicated above, point No.(ii) and (iii) are being taken up first for convenience.

[12] Point No.(ii)-Whether the suit is barred by the principles of res-judicata or constructive res-judicata-

The first suit, MS No.10 of 2012 was rejected by the trial Court vide order dated 06.06.2014 on the ground that it was mainly barred under Section 69(2) of the Partnership Act, 1932. While dealing with the subsequent suit bearing No.MS 02 of 2015 both the Courts below missed the applicability of provision of Order VII Rule 13, CPC which envisages that the rejection of the plaint on any of the ground hereinbefore mentioned i.e. the ground mentioned in Order VII Rule 11, CPC shall not of its own force preclude the plaintiffs from presenting a fresh plaint in respect of the same cause of action. Therefore, rejection of the plaint of earlier suit would not preclude the plaintiffs from instituting a fresh suit on the same cause of action. Consequently, the observation of the trial Court that the subsequent suit was barred by principle of *res judicata* was not proper. Moreover, the question of *res judicata* is generally a matter of mixed question of both law and fact, and therefore to examine as to whether subsequent suit is barred by principle of *res judicata* or not, Court is required to examine many other documents such as plaint of the previous suits, issues involved therein and decision given by Court thereon etc.

[13] Hon'ble Supreme Court in ***Prem Kishore and others vs. Brahm Prakash and others (2023 SCC OnLine SC 356)*** referred to certain observations made another decision in ***Kamala vs. K.T. Eshwara Sa, (2008) 12 SCC 661*** that for the purpose of invoking Order VII Rule 11(d), CPC, no amount of evidence can be looked into

and the issues on merit of the matter which may arise between the parties would not be within the realm of the Court at that stage. Where the question involving a mixed question of law and fact, which may require not only examination of the plaint but also other evidences and the order passed in the earlier suit may be taken up as preliminary issue or at the final hearing, but said question cannot be determined at that stage. Therefore, it is held that the trial Court committed grave mistake by rejecting the plaint on the ground of *res judicata* by framing preliminary issue and the observations of the first appellate court to some extent was correct though said court has also missed the provision of Or.VII, r.13 CPC .

[14] Point No.(iii)- Whether the suit is barred by the law of limitation-

By catena of decisions, it has been held by the Hon'ble Supreme Court that on every occasion plaint cannot be rejected on the ground of limitation, inasmuch as the question of limitation is also generally a mixed question of law and fact. Provision of Order VII Rule 11(d), CPC has limited application and to reject a plaint at the initial stage of a suit by framing preliminary issue and without going for recording of evidence, it must be shown that the suit is barred by any law and that conclusion should be drawn from averments made in the plaint. Therefore, the plaint should be given a meaningful reading taking the contents of the plaint as a whole to be true. An application for rejection of plaint can be allowed on the

ground that suit is barred by any law, when taking the allegations made in the plaint as correct in its face value, it is found that the suit is barred by law. **[Re.- C. Natrajan vs. Ashim Bai and another; (2007) 14 SCC 183, Geetha and others vs. Nanjundaswamy and others; 2023 SCC OnLine SC 1407, Eldeco Housing and Industries Limited vs. Ashok Vidyarthi and others; 2023 SCC OnLine SC 1612].**

[15] Further guiding principles regarding application of Order VII Rule 11(d) was enunciated by Hon'ble Supreme Court in **Srihari Hanumandas Totala vs. Hemant Vithal Kamat and others, (2021) 9 SCC 99** in the following terms:

"25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:

25.1. To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to.

25.2. The defence made by the defendant in the suit must not be considered while deciding the merits of the application.

25.3. To determine whether a suit is barred by res judicata, it is necessary that (i) the "previous suit" is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit.

25.4. Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the "previous suit", such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused."

[16] The preliminary issue framed on the point of limitation is required to be dealt with very cautiously, for, limitation being a mixed question of law and fact. Where the fundamental facts determining the starting point of limitation is vividly and specifically described in the plaint and the issue of limitation can be decided basing on the plaint's averments alone or by admitted facts, the Court may go for framing preliminary issue on that point resorting to the provision of Order XIV, Rule 2(2)(b), CPC by postponing framing of other issues in a suit. Decision on limitation as a preliminary issue basing on disputed facts is impermissible at law. **[Re.-Nusli Neville Wadia vs. Ivory Properties and others; (2020) 6 SCC 557, Mongia Realty and Buildwell Private Limited vs. Manik Sethi; (2022) 11 SCC 572, Sukhbiri Devi and others vs. Union of India and others; 2022 SCC OnLine SC 1322].**

[17] In the instant case in hand, as indicated in Paragraph No.5 above, the cause of action as shown by the plaintiffs are on different dates w.e.f. 28.01.2010 till 30.08.2011 and finally on 06.06.2014. As indicated above, the date 06.06.2014 is the date when their previous suit was rejected by the trial Court. Said date cannot be considered as last date of cause of action, inasmuch as it has no bearing upon the issues involved in the present suit nor it has any correlation with the alleged right to sue. If Article 14 of the Limitation Act, 1963 or even Article 55 of the same are applied, the plaintiffs were under legal responsibility to institute the suit within

3(three) years either from the date of delivery of the goods or from the date when the contract was broken and in case of successive breaches, when the breach in respect of which the suit is instituted ceases. Therefore, in the present suit, the commencement of period of limitation started, according to the plaintiffs as per the plaint, from 30.08.2011, but the suit was not filed within 3(three) years therefrom.

[18] The plaintiff at para 30 of the plaint also admitted that the suit was instituted after the expiry of the period of limitation and therefore sought for exemption from the period of limitation under the provision of Order VII, Rule 6, CPC. The grounds stated for such exemption have also been narrated at said Paragraph 30 as extracted below:

"30. That, moreover on 03.11.2014, the Plaintiff No.1 had to undergo surgical procedure for removal of Hydrocele and after operation the Plaintiff No.1 had to remain in bed rest for two months. After the dismissal of T.S 10 of 2012, by Order, dated, 06.06.2014, the Plaintiffs did not get proper legal advice as to what would be the next course of action. The Plaintiffs initially contacted with Mr. Dulal Saha, L'd Advocate, practicing in Tripura High Court to get proper legal advice as to the remedy against the Order, Dated, 06.06.2014, passed in T.S. 10 of 2012. Certified copy of the Order, dated, 06.06.2014 could be obtained by the Plaintiffs on 14.07.2014 and thereafter in the 3rd week of July, 2014, Plaintiff could be able to contact Mr. Dulal Saha, L'd Advocate to get his legal opinion. In the 1st week of September, Dulal Saha, L'd Advocate after going through the case file advised the Plaintiff to file fresh suit. Thereafter due to the various reasons, the Plaintiffs were prevented from filing the suit. Lastly the suit could be filed in the 3rd part of April, 2015. The Plaintiff seek exemption from law of limitation as due to above stated grounds, the Plaintiff instituted the suit after expiry of the period of limitation, exemption from the law of limitation in filing the suit as contemplated under Order 7 Rule 6 of the CPC requires to be granted to

the Plaintiff by the L'D Court in the interest of equity and substantial justice."

[19] Generally Section 5 of the Limitation Act, 1963 has no application in case of instituting a time barred suit unless any special provision of any statute makes it applicable. The explanation as given above by the plaintiffs may be valid grounds for a petition filed under Section 5 of the Limitation Act, 1963 in some cases, but, so far as exemption from limitation under Order VII Rule 6, CPC are concerned, same cannot be applied, for the reason that the grounds set forth or the explanations given for such exemption do not fall within the categories as catalogued in Section 12 to 19 of the Limitation Act, 1963. Therefore, the trial Court rightly held that the present suit was time barred, as it was clear admission in the plaint that suit was time barred and more so, from the contents of the plaint itself, it was clearly discernible that the suit was barred by limitation.

[20] Point No.(i)- Whether the order passed by the learned first appellate Court remitting the matter back to the learned trial Court is perverse-

In view of the above discussion, it is held that without going to the in-depth scrutiny of the issues involved in the first appeal, the first Appellate Court committed grave mistake in remanding the case leading to a perverse decision.

[21] In view of the above, the suit is held to be barred by law of limitation. Accordingly, the impugned judgment dated 03.02.2023 passed by the Additional District Judge, North Tripura, Dharmanagar in Money Appeal No.03 of 2017 and the consequent decree thereof are hereby set aside.

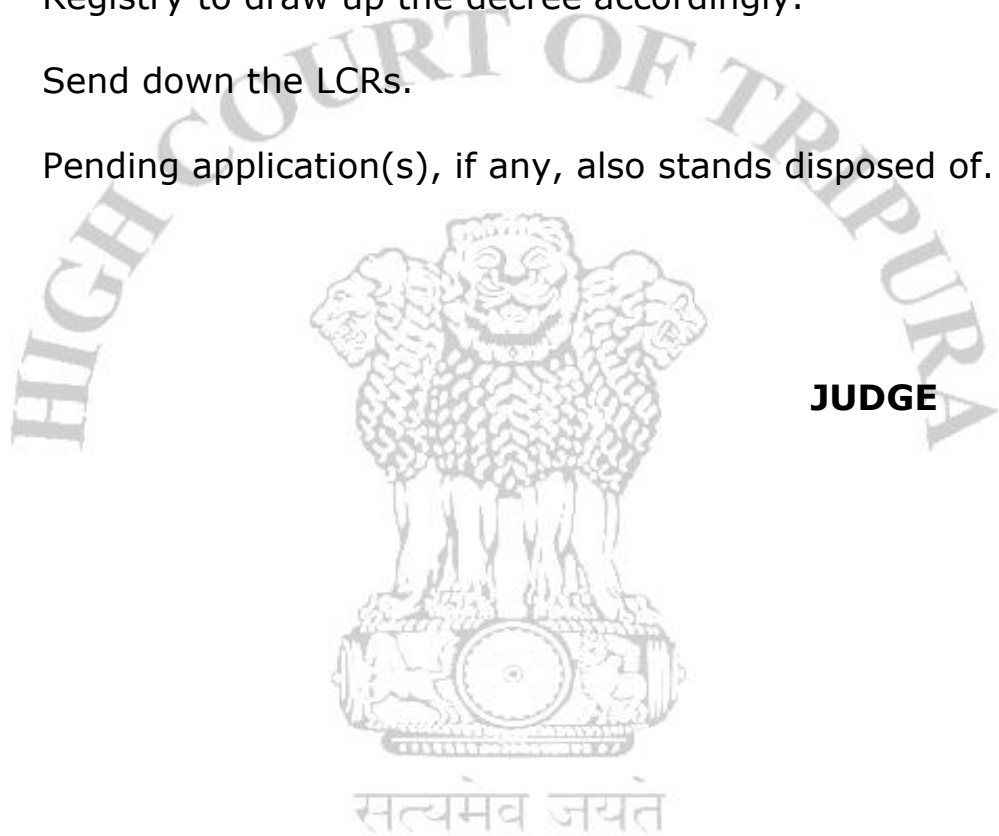
Appeal stands disposed of.

No order as to cost considering the circumstances involved in the case.

Registry to draw up the decree accordingly.

Send down the LCRs.

Pending application(s), if any, also stands disposed of.



JUDGE

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