

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1413 of 2016**

=====

Radhe Bind & Ors

.... Petitioner/s

Versus

Shivmurat Bind & Ors

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Ranjan Kumar Dubey

For the Respondent/s : Mr.

=====

**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO**

ORAL ORDER

2 20-12-2016 Heard the learned senior counsel, Mr. S.S.Dvivedi for

the petitioners and the learned counsel, Mr. Sourendra Pandey for

the respondent Nos.4, 10, 18, 31 and 33 to 35.

This application under Article 227 of the Constitution of India has been filed by the petitioners for setting aside the order dated 26.09.2016 passed by Sub Judge VI, Kaimur at Bhabhua in Misc. Case No.537 of 2014/Registration No.8628 of 2014 whereby the learned Court below has dismissed the miscellaneous case on the ground of limitation only.

The learned senior counsel for the petitioners raised a short point. According to the learned senior counsel, Miscellaneous Case No.537 of 2014/Registration No.8628 of 2014 was filed by the petitioners for setting aside the compromise decree passed in Title Suit No.214 of 1963 in the year 1969. In



paragraph 17 of the miscellaneous application, before the court below, it was specifically pleaded that the petitioners came to know about the fraudulent compromise decree in the year 2014 and, therefore, the miscellaneous case was filed. The miscellaneous case was admitted. The respondents appeared in the said case and filed an application that the petitioners were not party in the compromise application and, therefore, the miscellaneous case is not maintainable. The court below by the impugned order held that the miscellaneous case filed by the petitioners after 45 years is hopelessly barred by law of limitation and it is not liable for condonation.

The learned counsel for the respondents submitted that the court has the jurisdiction to dismiss the miscellaneous case without recording any evidence. The petitioners are required to prove that there is any fraudulent compromise decree. Unless the same is proved, the court is not obliged to record evidences on behalf of the parties.

Perused the impugned order and the miscellaneous application which has been annexed as Annexure 3 to this miscellaneous case. From perusal of the same, it appears that at paragraph 17 of the miscellaneous case, filed under Section 151 C.P.C., it is specifically pleaded by the petitioners that they came



to know about the fraudulent compromise decree on 20.10.2014 and the miscellaneous case has been filed in the year 2014. Now therefore, this question as to when they came to know about the existence of the fraudulent compromise decree is a pure question of fact. It is settled principles of law that pleading is not the proof of the fact pleaded. The same has to be proved by adducing evidence. In the present case, the Court below did not allow the petitioner or did not grant opportunity to the petitioner to prove the fact alleged by him that he had no knowledge about the fraudulent ex parte decree.

Article 59 of the Limitation Act provides that for setting aside or cancelling an instrument or decree the action has to be taken within three years when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him. Therefore, in view of this provision, the period from which the limitation will be counted is the date when the fact entitling the plaintiff to take action was known to him. According to the petitioners, the fact came to his knowledge in the year 2014. Now therefore, in view of this pleading, it is for the respondents to show that the fact alleged by the petitioners or pleaded by the petitioners is incorrect as he had already got the knowledge prior to the date alleged by the



petitioners or that this application filed by the petitioners, who are admittedly the descendants of the party, who are the signatories to the compromise application. The Court below instead of granting opportunity to the petitioners to prove their case has decided the miscellaneous application only on the basis of assumption and presumption made by the Court that this has been filed after 45 years, therefore, it cannot be presumed that the petitioners had got knowledge about the fraudulent compromise decree.

It appears that the Court below has not decided the maintainability of the miscellaneous case and the application filed by respondents is still pending.

Now, the question of limitation arises i.e. when it is to be filed, then Article 59 of the Limitation Act will come into play. Since the question of limitation is a disputed question of fact and it can be decided only on the basis of evidence that may be produced by the parties, the Court could not have presumed the facts in favour of either of the party and could not have rejected/dismissed the miscellaneous case on the basis of pleading only.

So far the submission of the learned counsel for the respondents that the petitioners are unable to show that the compromise decree is fraudulent compromise decree and, therefore, for that purpose, evidence is not necessary to be



recorded, it may be mentioned here that Order VI Rule 4 C.P.C. specifically provides that the fraud has to be specifically pleaded. The petitioners have pleaded the fraud specifically giving the details in the application. Again, now the fraud pleaded by the petitioners in the miscellaneous application is only about the facts pleaded and the pleading itself is not sufficient and for proving the fact alone in support of the fraudulent act, opportunity has to be given to the petitioner to prove the same by leading evidence.

Since the respondents jointly had filed the application in the miscellaneous application praying for rejection of the miscellaneous case, their case is common and moreover, this Court is disposing of this civil miscellaneous application on the question of law only deciding that the petitioner's application could not have been rejected on presumption and assumption and surmises and conjectures. In such circumstances, since it is pure question of law which has not been considered by the court below and many of the respondents are appearing through the learned counsel, it is not desirable to hear the other respondents on the same question of law.

In my opinion, therefore, no notice is required to be issued to the other respondents for hearing the same question and accordingly, the Civil Miscellaneous application is allowed. The



impugned order dated 26.09.2016 passed by Sub Judge VI,
Kaimur at Bhabhua in Misc. Case No.537 of 2014 is set aside. The
Court below is directed to proceed according to law.

(Mungeshwar Sahoo, J)

Saurabh/-

U		T	
---	--	---	--

