

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.14097 of 2013

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MAHESHWARI PRASAD SINGH SON OF LATE DWARIKA PRASAD SINGH
RESIDENT OF MOHALLA - NAYA TOLA, BHIKHANPUR, GYANENDRA
NATH MUKHERJEE ROAD, PRESENT WARD NO. 35, P.S. ISHAKCHAK,
ANCHAL - JAGDISHPUR, P.O. BHAGALPUR - 1, DIST. BHAGALPUR

.... PETITIONER/S

VERSUS

1. THE STATE OF BIHAR , THROUGH SECRETARY, DEPARTMENT OF
REVENUE AND LAND REFORMS, GOVERNMENT OF BIHAR, PATNA
2. THE COLLECTOR, DIST. BHAGALPUR
3. THE DEPUTY COLLECTOR OF LAND REFORMS, SADAR,
BHAGALPUR
4. KALAWATI DEVI W/O RAJENDRA PRASAD BHAGAT.
5. SHAKUNTALA DEVI W/O BISHWANATH DAS.
4 & 5 RESIDENTS OF MOHALLA - BHIKHANPUR, NAYA TOLA
GYANENDRA NATH MUKHERJEE ROAD, P.S. ISHAKCHAK, DIST
BHAGALPUR.

.... RESPONDENT/S

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Appearance:

For the Petitioner/s	:	Mr. Ambuj Nayan Choubey, Adv. Mr. Chakrapani, Adv. Mr. Dipak Kumar, Adv. Mr. Sanjay Kumar Singh, Adv. Mr. Madhuresh Singh, Adv.
For the Respondent/s	:	Mr. P.K. Verma, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

Date: 28-10-2016

Petitioner is the defendant in Title Suit No.139/2011 pending before Munsif-IIInd, Bhagalpur. On account of refusal by the learned lower court vide order dated 25.03.2013 to accede with the prayer having been made on behalf of petitioner in terms of Order-VII Rule-11 of the CPC along with Order-XIV Rule-2 of the CPC, instant petition has been filed.

2. From perusal of the order impugned, it is evident that learned lower court had not rejected the prayer of the petitioner rather observed that the question relating to cause of action as well as limitation are mix question of law and fact which could be decided after evidence of the parties as a result of which

it could not be decided by way of preliminary issue.

3. How the matter in case so raised under Order-VII Rule-11 CPC is to be taken up. In *Sopan Sukhdeo Sable & Ors. Vs. Assistant Charity Commissioner & Ors.* reported in (2004) 3 SCC 137, it has been observed:

“The trial court can exercise the power at any stage of the suit and before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial.”

Further in para-20 it has been observed:

“.....Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word “shall” is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule-11, even without intervention of the defendant. ...”

4. In *P.V. Guru Raj Reddy represented by GPA Laxmi Narayan Reddy & Anr. Vs. Neeradha Reddy & Ors.* reported in (2015) 8 SCC 331, it has been held:-

“5. Rejection of the plaint under Order VII rule 11 of the CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.”

5. So far question of limitation is concerned, in *Satti Paradesi Samadhi & Pillayar Temple Vs. M. Sankuntala (Dead) Through Legal Representatives & Ors.* reported in (2015) 5 SCC 674, it has been observed:

“14. In *Ramesh B. Desai v. Bipin Vadilal Mehta* (2006) 5 SCC 638, while dealing with the issue of limitation, the Court opined that: (SCC p. 652, para 19)

“19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact.”

The Court further proceeded to state that a plea of limitation is a mixed question of fact and law. On a plain consideration of the language employed in sub-rule (2) of Order 14 it can be stated with certitude that when an issue requires an inquiry into facts it cannot be tried as a preliminary issue. In the said judgment the Court opined as follows: (*Ramesh B. Desai case* (2006) 5 SCC 638, SCC p. 650, para 13)

“13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in *Major S.S. Khanna v. Brig. F.J. Dillon* AIR 1964 SC 497 and it was held as under: (AIR pp. 502-03, para 18 : SCR p. 421)

‘18. ... Under Order 14 Rule 2 of the Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit.’

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the above quoted decision still holds good and there can be no departure

from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.”

15. In the case at hand, we find that unless there is determination of the fact which would not protect the plaintiff under Section 10 of the Limitation Act the suit cannot be dismissed on the ground of limitation. It is not a case which will come within the ambit and sweep of Order 14 Rule 2 which would enable the court to frame a preliminary issue to adjudicate thereof. The learned Single Judge, as it appears, has remained totally oblivious of the said facet and adjudicated the issue as if it falls under Order 14 Rule 2. We repeat that on the scheme of Section 10 of the Limitation Act we find certain facts are to be established to throw the lis from the sphere of the said provision so that it would come within the concept of limitation. The Division Bench has fallen into some error without appreciating the facts in proper perspective. That apart, the Division Bench, by taking recourse to Articles 92 to 96 without appreciating the factum that it uses the words “transferred by the trustee for a valuable consideration” in that event the limitation would be twelve years but in the instant case the asseveration of the plaintiff is that the trustee had created three settlement deeds in favour of his two daughters and a granddaughter. The issue of consideration has not yet emerged. This settlement made by the father was whether for consideration or not has to be gone into and similarly whether the property belongs to the Trust as Trust is understood within the meaning of Section 10 of the Limitation Act has also to be gone into. Ergo, there can be no shadow of doubt that Issue 1 that was framed by the learned Single Judge was an issue that pertained to the fact and law and hence, could not have been adjudicated as a preliminary issue. Therefore, the impugned order (2012) 2 LW 865 (Mad) is wholly unsustainable.”

6. With regard to scope of applicability of Order-14 Rule-2 of the CPC, in *Satti Paradesi Samadhi & Pillayar Temple Vs. M. Sankuntala (Dead) Through Legal Representatives & Ors.* (Supra), it has been held:

12. In *Ramrameshwari Devi v. Nirmala Devi* (2011) 8 SCC 249, while dealing with Order 14 Rule 2, this Court observed that: (SCC p. 259, para 25)

“25. Sub-rule (2) [of Order 14] refers to the discretion given to the court where the court may try an issue relating to the jurisdiction of the court or the bar to

the suit created by any law for the time being in force as a preliminary issue.”

13. The controversy pertaining to the provisions contained in Order 14 Rule 2 had come up for consideration before this Court in *Major S.S. Khanna v. Brig. F.J. Dillon AIR 1964 SC 497*, wherein it has been ruled thus: (AIR pp. 502-03, para 18)

“18. ... Under Order 14 Rule 2 of the Code of Civil Procedure, where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lopsided trial of the suit.”

Be it stated, the aforesaid pronouncement was made before the amendment of the Code of Civil Procedure in 1976.”

7. Now coming to facts of the case, on account of non-filing of plaint, the relief so sought for and the cause of action as narrated is not available however, the petition having been filed on behalf of petitioner under Order-VII Rule-11 of the CPC along with Order-XIV Rule-2 of the CPC has been annexed as Annexure-1 wherefrom, it is evident that plaintiff had sought for relief for declaration of an absolute ownership as well as title holder of the suit property and further, the final publication of suit property under revisional municipal survey operation not binding upon the plaintiff.

8. From the aforesaid petition, it is apparent that petitioner had detailed, a kin to W.S. his plea and further, stated that as the suit has not been filed within three years from final publication of Khatian, consequent thereupon either the plaint be rejected on the point of limitation and if not, the factual matter

as pleaded should be decided in terms of Order-XIV Rule-2 of the CPC.

9. Learned counsel for the petitioner has relied upon 2006 (1) PLJR 1(SC), AIR 2002 Punjab & Haryana 330. After going through the aforesaid decisions, it is apparent that the same is not applicable in the facts and circumstances of the case.

10. Apart from the fact that limitation is to be counted from the date of knowledge but with regard to revisional survey entry the possession is found duly explained by the Hon'ble Apex Court in **Daya Singh and another v. Gurdev Singh (Dead) by LRS. and others reported in (2010) 2 SCC 194.**

"14. In support of the contention that the suit was filed within the period of limitation, the learned senior counsel appearing for the plaintiffs/appellants before us submitted that there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. In support of this contention the learned senior counsel strongly relied on a decision of the Privy Council reported in AIR 1930 PC 270 [Mt. Bolo vs. Mt. Koklan and others]. In this decision their Lordships of the Privy Council observed as follows :(IA p. 331) "... There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

15. A similar view was reiterated in the case of C. Mohammad Yunus vs. Syed Unnissa and others [AIR 1961 SC 808] in which this Court observed : (AIR p. 810, para 7)

"7. ... The period of six years prescribed by Article 120 has to be computed from the date when the right to sue accrues and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right."

In C. Mohammad Yunus (AIR 1961 SC 808), this Court held that the cause of action for the purposes of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is at least a clear and unequivocal threat to infringe that right. Therefore, the mere existence of an adverse entry in the revenue records cannot give rise to cause of action."

11. In the aforesaid facts and circumstances of the case, the learned lower court had rightly observed that the matter in hand is to be decided after full-fledged trial whereupon instant petition is found non-maintainable and is accordingly rejected.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	AFR
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