

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Civil Revision No. 39 of 2014**

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Ram Dular Singh Son Of Late Ram Prasad Singh Resident Of Village- Kharona,  
P.S- Makhdumpur, District- Jehanabad At Present Resident Of Mohalla Kharkatta (  
Commonly Known As Gayatrighat), P.S- Civil Lines, District- Gaya.

.... (Defendant).....Petitioner

Versus

Akhil Bharat Jay Guru Samparday @ Akhila Bharat Jai Guru Samparday Having  
Its Head Office At Mahamilan Math 717 P.W.D. Road, Calcutta- 35, Through Its  
Mukhtar Aam, Govindo Das Bhattacharya Son Of Late Guru Das Bhattacharya  
Resident Of Mohalla Brahamani Ghat, P.S- Civil Lines, Town And District- Gaya,  
One of the disciples of the Akhil Jay Guru Samparday.

.... (Plaintiff)..... Opposite Party

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**Appearance :**

For the Petitioner : Mr. Surendra Kr. Singh, Sr. Adv.  
Mr. Arora, Adv.  
Mr. Praveen Prakash, Adv.  
For the Opposite Party : Mr. Madhuresh Prasad, Adv.  
Mr. Abhay Shankar, Adv.

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR  
SRIVASTAVA**

**C.A.V. JUDGMENT**

**Date: 29-03-2017.**

1. This civil revision has been filed for setting aside the  
order dated 15.01.2014 passed by learned Sub Judge-VII, Gaya in  
Title Suit No. 35 of 2010 by which and whereunder he rejected the  
petition dated 15.11.2011 filed by the defendant-petitioner under  
Order-VII, Rule-11 (a) and (d) of the C.P.C. seeking rejection of  
plaint of T.S. No. 35 of 2010.



2. The plaintiff-opposite party filed Title Suit No. 35/596 of 2010 on 20.09.2010 against the defendant-petitioner. The case of the plaintiff-opposite party is that a double storied building situated in Municipal Plot no. 17834(Old), Revisional Municipal Survey Plot No. 1871 (New), bearing Holding No. 21, Ward No. 7(Old), 24(New) of Mohalla Karkatta, P.S. Civil Lines, District Gaya originally owned and possessed by Late Satya Narayan Ganguli. The aforesaid Satya Narayan Ganguli died on 09.10.1961 leaving behind his widow, three sons and three daughters, who later on, on 12.09.1981, executed a registered deed of gift in favour of plaintiff-opposite party and accordingly, donated the aforesaid house to plaintiff-opposite party. After the aforesaid donation, the plaintiff-opposite party came in possession of the suit house and subsequently, plaintiff-opposite party got mutated his name in Gaya Municipality on 14.11.1986 and started paying tax to the municipality but one of the trustees of the plaintiff-opposite party came to Gaya on 04.12.1986 and found that defendant-petitioner and some other persons, unauthorizedly, encroached the premises of the house in question after breaking and opening the locks of door of the donated house. The plaintiff-opposite party approached the Sub-divisional Officer, Sadar, Gaya who subsequently, ordered to evict the defendant-petitioner and accordingly, the defendant-petitioner was forcibly evicted from the



said house and vacant possession of the said house was given to the plaintiff-opposite party on 16.06.1987. The defendant-petitioner approached the Collector, Gaya, who stayed the order of Sub-divisional Officer, Sadar, Gaya and in the light of order of the Collector, Gaya he again entered in the aforesaid house with the help of police and Magistrates. Thereafter, plaintiff-opposite party again filed a petition on 27.02.1989 before the District Magistrate, Gaya, who vide his order dated 31.12.1991 disposed of the aforesaid petition holding that parties may go to the Civil Court for appropriate relief. The plaintiff-opposite party approached this Court by filing writ petition but the same was disposed of holding that said petition was without jurisdiction. The parties also started fighting the matter before the revenue authorities to get their name mutated in revenue records. However, the plaintiff-opposite party filed Title Suit No. 153 of 1993 in the court of Sub Judge, Gaya against the defendant-petitioner for declaration of his title, recovery of possession of the disputed house and for recovery of damage. The plaintiff-opposite party averred in the plaint of Title Suit No 35 of 2010 that after filing of Title Suit No 153 of 1993, defendant-petitioner approached the Mukhtar-e-Aam of the plaintiff-opposite party and offered for compromise and accordingly, he agreed to pay damage of Rs. 5000/- in cash and also agreed to pay Rs. 50/- as rent per month. The



plaintiff-opposite party due to above stated oral compromise left the pairvi of Title Suit No 153 of 1993 and also left pairvi before revenue authorities as a result whereof, Title Suit No 153/93 dismissed in default on 06.01.2000. It has further been averred in the plaint that pairvikar of the plaintiff-opposite party fell seriously ill and went to Calcutta in connection with his treatment and having got cured in the month of April, 2004, he came to Gaya and met the defendant-petitioner. The attorney power holder of the plaintiff-opposite party demanded rent from the defendant-petitioner but defendant-petitioner denied the title of plaintiff-opposite party on 30.04.2004 and in the month of April 2004, the attorney power holder of plaintiff-opposite party got knowledge about disposal of Title Suit No 153/93 and thereafter, on the advice of his lawyer, filed Title Suit No 35 of 2010. However, it has also been averred that power of attorney holder of the plaintiff-opposite party was engaged in pursuing the Survey Appeal No. 485/90 and after disposal of the aforesaid appeal when he again demanded rent from the defendant-petitioner on 30.11.2009, the defendant-petitioner again refused to pay the rent and denied the title of plaintiff-opposite party. According to plaintiff-opposite party, the cause of action arose on 30.11.2009 when the defendant-petitioner finally refused to accept the title of the plaintiff-opposite party in respect of the disputed house and to refuse to pay the rent.



On the basis of aforesaid averments, plaintiff-opposite party filed the above stated Title Suit No 35/2010 against the defendant-petitioner for declaration of his title over the disputed house and for eviction of defendant-petitioner treating him as trespasser and also for delivery of possession of the disputed house to the plaintiff-opposite party.

3. The summons was issued to defendant-petitioner who appeared before the Sub Judge, Gaya and filed petition under Order-VII, Rule-11 (a) and (d) of the C.P.C for rejection of plaint of Title Suit No 35/2010 on the ground that originally, Title Suit No 153/93 was filed for same relief as well as for same cause of action and the aforesaid suit was dismissed under Order-IX, Rule-8 of the C.P.C and, therefore, fresh suit was not maintainable Order- IX, Rule-9 of the C.P.C and furthermore, on the ground that Title Suit No 35/2010 is highly time barred.

4. Learned Sub Judge-VII, Gaya having heard the parties rejected the aforesaid petition holding that plea of res judicata can only be decided after full-fledged evidence as the aforesaid plea is a mixed question of fact and law.

5. Learned counsel appearing for the defendant-petitioner submits that learned court below misconstrued the points raised by the defendant-petitioner in his petition filed under Order-VII, Rule-11(a) and (d) of the C.P.C and as a matter of fact, the defendant-



petitioner never raised the plea of res judicata rather the defendant-petitioner raised the plea that Title Suit No 35/2010 was barred by Order-IX, Rule- 9 of the C.P.C because Order- IX Rule 9 of the C.P.C. does not permit to file fresh suit, if the previous suit is dismissed for default in absence of the plaintiff. He further submits that learned court below also failed to take note of this fact that Title Suit No 35/2010 was highly time barred because according to Part-III of Article 58 of Limitation Act, the period of limitation is only for three years and the period for limitation starts when right to sue first accrues. He further submits that Section 3 of Limitation Act says that there is no need to set up the defence of limitation and, therefore, it was the bounded duty of the learned court below to see as to whether Title Suit No 35/2010 was within the limitation period or not. He also submits that Order VII, Rule 11 (d) says that plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. He submits that in the present matter, the very pleadings of the plaint go to show that suit was highly time barred but even then the learned court below did not take note of the aforesaid fact and rejected the petition filed by the defendant-petitioner under Order-VII, Rule 11 of the C.P.C.

6. Learned counsel for the defendant-petitioner cited the decision of **Suraj Rattan Thirani and others v. Azamabad Tea Co.**



**Ltd. and others reported in AIR 1965 SC 295** in which the Apex Court of this country held that Order- IX, Rule-9 of the C.P.C precludes a second suit in respect of the same cause of action where the first suit is dismissed for default of appearance of the plaintiff and to consider as to whether the cause of action in the subsequent suit is the same or not, as the cause of action in the previous suit, the test to be applied is “as to whether the causes of action in the two suits in substance and not technically are identical or not and thus, the term “cause of action” is to be construed with reference rather to the substance than to the form of action.

7. Learned counsel submits that in the aforesaid decision, the Apex Court relied upon the decision reported in AIR 1949 Privy Council, 78. He further submits that the aforesaid principle was followed by Apex Court as well as other Hon’ble courts in several decisions. He further submits that even if any question under Order-VII, Rule-11 is not raised, then also, it is the bounded duty of the court to see as to whether the suit is hit by Order VII Rule 11 of the CPC or not. He referred decision of **Saleem Bhai and others v. State of Maharashtra and others reported in AIR 2003 SC 759**. In the aforesaid decision, the defendant of the said case raised a point that the plaint of the aforesaid case was liable to be rejected under Order VII Rule 11 (a) and (d) of the CPC. In the aforesaid decision,



the defendant had not filed any written statement and a petition was filed by plaintiff of that suit to pronounce the judgment under Order VIII Rule 10 of the CPC. The learned trial Judge dismissed the petition filed under Order VIII Rule 10 of CPC and directed the defendant of that suit to file written statement before disposal of application filed under Order VII Rule 11 of the CPC. The Apex Court in that situation directed the trial court to decide the application under Order VII Rule 11 of the CPC first on the basis of averments made in the plaint.

8. He also cited the decision of **T. Arivandandam v. T.V. Satyapal and another reported in (1977) 4 SCC 467** in which the Hon'ble Apex Court held at Para-5 of the judgment which runs as follows:- **"The learned Munsif must remember that if on a meaningful-not formal—reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII, Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C."**

9. Learned counsel for the defendant-petitioner cited the decision of **N.V. Srinivasa Murthy and others v. Mariyamma reported in 2006(1) PLJR (SC) 1** in which the Hon'ble Apex Court held that if any suit filed hopelessly barred by time is cleverly drafted



to get over the bar of limitation, the same must be rejected under Order VII, Rule 11 of the CPC. He submits that it is admitted in the plaint itself that defendant-petitioner denied the title of the plaintiff and refused to vacate the disputed house in the month of April 2004 but even then the suit was filed in the year 2010 i.e. near about after six years of denial of title and, therefore, the Title Suit No 35 of 2010 was clearly barred by part III of Article 58 of Limitation Act. He submits that the admitted facts need not be proved. In support of his contention, he referred a decision reported in **AIR 2007 SC 2380** in which at para-23 of the judgment, the Hon'ble Apex Court has held that in terms of Section 58 of the Indian Evidence Act, 1872, a thing admitted need not be proved and, therefore, there was no requirement to adduce the evidence to prove the delay in filing the Title Suit No 35/2010 and the court below was duty bound to exercise the power vested under Order VII, Rule-11 of the CPC.

10. Learned counsel appearing for the plaintiff-opposite party refuted the above stated submissions arguing that at para 32 and 33 of the plaint, it has, specifically, been averred that the defendant-petitioner finally refused to make payment of rent and to vacate the house and also claimed his title over the disputed house on 30.11.2009 and, therefore, cause of action arose on 30.11.2009. He further submits that Title Suit No 35/2010 was filed on 20.09.2010



i.e. within the period of limitation and, therefore, the question of limitation in filing the Title Suit No 35/2010 does not arise. He further submits that in Title Suit No 153/93, the cause of action arose on 28.04.1993 when this court rejected CWJC No. 3249 of 1991 and, therefore, the causes of action of both the aforesaid suits are different and cannot be said to be identical. He submits that in the aforesaid circumstance, Order IX, Rule 9 of the CPC is not applicable in this case. He further submits that it is well settled principle of law that order under Order VII Rule 11 can be passed only on the basis of averments of the plaint and at that stage the defence cannot be looked into. He submits that in the present case, there is specific averment at para-33 of the plaint that cause of action of the present suit arose on 30.11.2009 and, therefore, the learned court below rightly rejected the petition filed under Order VII, Rule 11 of the CPC. He further submits that so far as the application of res judicata is concerned, the court incidentally observed that the previous suit i.e. Title Suit No 153/93 shall not operate as principle of res judicata in respect of the second suit and, therefore, there is no illegality in the impugned order of the court below. Learned counsel appearing for the plaintiff-opposite party relied upon the decision of **P.V. Guru Raj Reddy and another v. P. Neeradha Reddy and others reported in (2015) 8 SCC 331** in which it has been held by the Hon'ble Apex Court that



**while exercising of power under Order VII Rule 11 CPC, only the averments in plaint have to be read as a whole and the plaint can be rejected only if the averments made therein ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law.**

11. Having heard the parties, I went through the record as well as decisions cited on behalf of the parties. It is an admitted position that prior to filing of Title Suit No 35/2010, the plaintiff-opposite party had filed Title Suit No. 153/93 against the defendant-petitioner in respect of the same disputed house and in the aforesaid suit, the plaintiff-opposite party sought relief for declaration of his title over the suit house, for delivery of possession through the process of the court by evicting the defendant-petitioner treating him as trespasser and also for damage of rupees five thousand. The aforesaid suit was filed in the year 1993 and remained pending before the learned Sub Judge Gaya till 06.01.2000 when the suit was dismissed in default in absence of the plaintiff. The photostat copy of complete order sheets of Title Suit No 153/1993 have been brought on record as Annexure-5 to the petition. The order sheets of aforesaid Title Suit No 153/93 go to show that plaintiff-opposite party left the pairvi of aforesaid suit since 24.06.1997 and lastly, the aforesaid suit was dismissed on 06.01.2000 in absence of the plaintiff-opposite party whereas defendant-petitioner was present before the court at the



time of dismissal of aforesaid Title Suit No 153/93. Therefore, it is apparent that the aforesaid order was passed under Order IX Rule 8 of the CPC which says that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder. Therefore, the aforesaid provision clearly speaks that if the suit is called on for hearing and the plaintiff of the suit fails to appear whereas the defendant of the suit makes his presence before the court, the suit shall be dismissed either whole or part thereof, if some portion of the suit is admitted by the defendant.

12. Order IX, Rule 9 says that where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action but he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a date for proceeding with the suit.

13. Bare perusal of the aforesaid provision goes to show



that aforesaid provision completely precludes the plaintiff of the suit to file a fresh suit, if his suit is dismissed under Order IX Rule 8 of the CPC rather gives an opportunity to the plaintiff of that suit to file a miscellaneous case for setting aside the dismissal order. However, Order IX, Rule 9 of the CPC says that fresh suit is only barred, if the causes of action of both the suits are identical. Therefore, it is obvious from the perusal of aforesaid provision that if cause of action of the previous suit is different to the latter suit, the latter suit shall not be hit by Order IX, Rule 9 of the CPC. Now, it has to be seen whether Title Suit No 35/2010 is hit by under Order IX, Rule 9 of the CPC or not.

14. The plaintiff-opposite party has pleaded at para-21, 22 and 25 of the plaint of T.S. No. 35/2010 that the plaintiff-opposite party filed Title Suit No 153 of 93 which was dismissed in default of plaintiff-opposite party. Therefore, the fact of dismissal of T.S. No. 153/93 is not in dispute rather it was admitted in the pleading of the plaint itself. However, it has to be seen as to whether the cause of action of Title Suit No 153/93 is different from cause of action of Title Suit No 35/2010 or not. The entire foundation of plaint of Title Suit No 153/93 was based on the denial of title of plaintiff-opposite party by the defendant-petitioner in respect of disputed house and the plaintiff-opposite party filed aforesaid Title Suit No 153/93 for



declaration of his title, eviction of the defendant-petitioner and recovery of possession of the suit house. The averments of plaint of Title Suit No 153 of 93 go to show that dispute between the parties arose sometime in the year 1986 and after that the parties fought before the revenue officials and before this Court also and thereafter the aforesaid Title Suit No 153/93 was filed. However, the averments of the plaint of Title Suit No 153/93 are quite similar to the averments of plaint of Title Suit No 35 of 2010 though some new facts were added in the plaint of Title Suit No 35/2010. The plaintiff-opposite party filed Title Suit No 35/2010 with new averment made in the plaint that after filing of Title Suit No 153/93, the defendant-petitioner approached him and accepted the title of plaintiff-opposite party and an oral agreement took place between the parties and that was the reason the plaintiff-opposite party left the pairvi of Title Suit No 153/93 which was resulted in dismissal in his absence. However, the plaintiff-opposite party pleaded that after the aforesaid oral agreement, again defendant-petitioner denied the title of the plaintiff in 2004 and later on, in 2009 and thereafter, the present suit was filed. The basic relief in both the above stated suits are for declaration of title and recovery of possession in respect of the disputed house. Therefore, it is apparent that the plaintiff-opposite party may get relief in Title Suit No 35/2010, if he succeeds to prove his title but



admittedly, in previous suit, a relief regarding declaration of title was sought for and that suit was dismissed under Order IX, Rule 8 and, therefore, in view of the Order IX, Rule 9 of the CPC the plaintiff-opposite party cannot file a fresh suit for the same relief and, therefore, the Title Suit No 35/2010 is clearly hit by Order IX, Rule 9 of the CPC but learned court below failed to take note of the aforesaid fact which was admitted in the plaint itself.

15. It is admitted in the plaint of Title Suit No 35/2010 that plaintiff-opposite party got knowledge of dismissal of Title Suit No 153/93 on 30.04.2004 and on the same day the defendant-petitioner denied his title in respect of the disputed house and also refused to pay rent but even then the plaintiff-opposite party filed Title Suit No 35/2010 on 20.09.2010 i.e. beyond period of limitation because Article 58 of Part III of Schedule of Limitation Act, 1963 says that to obtain any other declaration, the period of limitation is three years and the period of limitation begins to run when the right to sue first accrues. Therefore, it is obvious from the aforesaid pleading of plaint of Title Suit No 35/2010 that period of limitation to file suit started on 30.04.2004 when the defendant-petitioner denied the title of plaintiff-opposite party and refused to pay the rent. Therefore, I am of the opinion that Title Suit No 35/2010 was highly time barred.



16. So far as the date of cause of action given by the plaintiff-opposite party in Title Suit No 35/2010 is concerned, the same has been drafted very cleverly with an object to gain over the period of limitation but the pleadings of the aforesaid plaint are contradictory itself.

17. Order VII, Rule 11 (d) clearly says that if the statement made in the plaint goes to show that suit is barred by any law, in that event the plaint shall be rejected. In the present case, the averment made in Title Suit No 35/2010 goes to show that plaint of Title Suit No 35/2010 was not only hopelessly time barred but also barred under the provision of Order IX, Rule 9 of the CPC but even then the learned Sub Judge ignored the aforesaid facts and rejected the petition filed by defendant-petitioner under Order VII Rule 11 of the CPC.

18. The contents of the petition filed by defendant-petitioner before the court below under Order VII, Rule 11 of the CPC do not even whisper regarding the applicability of res judicata but it appears to me that learned Sub Judge misconstrued the provision of Order IX, Rule 9 of the CPC and rejected the aforesaid petition keeping in mind the principle of res jduicata. Therefore, in the aforesaid circumstance, I have no option except to allow this revision petition setting aside the impugned order dated 15.01.2014.



19. Accordingly, this civil revision petition is allowed and impugned order dated 15.01.2014 passed by Sub Judge-VII, Gaya in Title Suit No. 35/2010 stands set aside and the plaint of Title Suit No. 35/2010 is rejected under Order VII, Rule 11 (d) of the CPC. The trial court should proceed in the light of this order.

**(Hemant Kumar Srivastava, J)**

SHAHZAD/-

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