

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4049 of 2012

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1. Aftab Khan @ Tabayee Khan Son of Fuleman Khan
 2. Reejwan Khan Son of Aainul Haque
 3. Mostt. Shaharun Nisha Wife of Ainul Haque
All resident of Village- Karwandiya, P.S. Chand, P.O.&Distt.- Kaimur, Bhabhua.

.... Petitioner/s

Versus

1. Mustak Ahmad Khan Son of late Mukhter Khan, resident of Village- Karwandiya, P.S. Chand, P.O. and District- Kaimur, Bhabhua.
2. Sajeda Khatoon Wife of Hazan Khan
- 3(i) Naz Khan Son of late Majda Khatoon
(ii) Moosar Khan @ Rinku Son of late Majda Khatoon Both resident of Village- Pateri, P.O. Jamalpur, P.S. Chand, District- Bhabhua (Kaimur).
4. Malika Khatoon Wife of Rajeuddin Resident of Village- Bhoruhinya, P.O. Imiliya P.S. Sahebganj, District- Chenduali, U.P.
5. Khalija Begum W/o late Dilmohammad Khan @ Dillu Khan
All resident of Village- Karwandiya, P.S. Chand, P.O. and District- Kaimur, Bhabhua. At Present Village- Babura, P.S.- Bhabhua, District Kaimur, Bhabhua.
6. Ghura Khan Son of late Hidayat Khan, resident of Village- Karwandiya, P.S. Chand, P.O. and District- Kaimur, Bhabhua.
7. Mustaque Khan Son of late Chulhai Khan, resident of Village- Karwandiya, P.S. Chand, P.O. and District- Kaimur, Bhabhua.
8. Nijamuddin Khan
9. Kudus Khan
10. Manaur Khan Son of late Abdul Hayee Khan
11. Mostt. Sobara Khatoon wife of late Jahiruddin Khan
12. Imteyaj Khan
13. Harfan Khan@ Irfan Khan
14. Bhuwait Khan
15. Akhtar Khan
16. Puttan Khan
17. Reshad Khan Son of late Jahiruddin Khan
All resident of Kewandiya, P.S.- Chand, District- Kaimur at Bhabua.

.... Respondent/s

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with

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Civil Writ Jurisdiction Case No. 16033 of 2012

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1. Aftab Khan @ Tabayee Khan S/o Fuleman Khan,
 2. Reejwan Khan S/o Aainul Haque,
 - 3 Mostt. Shaharun Nisha Wife of Ainul Haque,
All residents of Village Karwandiya, Police Station- Chand, Post Office- Chand, District Kaimur, Bhabhua.



.... Petitioner/s

Versus

1. Mustak Ahmad Khan S/o Late Mukhtar Khan, R/o village- Karwandiya, Police Station And Post Office- Chand, District- Kaimur, Bhabhua
2. Sajeda Khatoon W/o Hasan Khan, R/o village- Pateri, Post Office- Jamalpur, Police Station- Chand, District- Kaimur, Bhabhua
- 3(A) Moosar Khan @ Rinku Son of late Majda Khatoon
(B) Naj Khan son of late Majda Khatoon
4. Malika Khatoon W/O Rajeuddin, R/O Village- Bhoruhinya, Post Office- Imaliya, Police Station- Sahebganj, District- Chendauli, U.P.
5. Khalija Begum Wife of Late Dil Mohammad Khan @ Dillu Khan, resident of Village- Karwandiya, P.S. Chand, P.O. and District- Kaimur, Bhabhua. at Present Village Babura, police Station Bhabhua, Distt. Kaimur, Bhabhua.
6. Chura Khan S/O Late Hidayat Khan, R/O Village- Karwandiya, Police Station- Chand, District- Kaimur, Bhabhua
7. Mustaque Khan S/O Late Chulhar Khan, R/O Village- Karwandiya, Police Station- Chand, District- Kaimur, Bhabhua
8. Nijamuddin Khan
9. Khuds Khan
10. Manaur Khan Sons of late Abdul Hayee Khan
11. Mostt. Sobara Khatoon Wife of late Jashiruddin Khan
12. Imteyaj Khan
13. Harfan Khan @ Ifran Khan
14. Bhuwait Khan
15. Akhtar Khan
16. Puttan Khan
17. Reshad Khan

Sl No. 12 to 17 are sons of late Jahiruddin Khan, R/o Karwandiya, Police Station- Chand, District- Kaimur at Bhabhua.

.... Respondent/s

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Appearance :

(In CWJC No.4049 of 2012)

Appearance :

For the Petitioner/s : Mr. Surendra Kr. Singh, Sr. Adv.
Mr. Arun Kumar Singh, Adv.
Mr. Praveen Kumar, Adv.

For the Respondent/s : Mr. Arabind Nath Pandey and Varun Kumar
(In CWJC No.16033 of 2012)

For the Petitioner/s : Mr. Surendra Kr. Singh, Sr. Adv.
Mr. Arun Kumar Singh, Adv.
Mr. Praveen Kumar, Adv.

For the Respondent/s : Mr. Arabind Nath Pandey and Varun Kumar

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CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR

ORAL JUDGMENT

Date: 21-03-2018

C.W.J.C. No. 4049 of 2012 and C.W.J.C. No. 16033 of



2012 have been filed by the same petitioners for setting the orders passed by the Sub-Judge-I in T.S. No. 238 of 2003.

2. The petitioners are plaintiffs of T.S. No. 238 of 2003. They have filed the aforesaid suit for declaration that the judgment and decree passed in T.S. No. 166 of 1970 and Execution Case No. 13 of 1975 are not binding on them. The plaintiffs further sought relief for partition claiming half share in the land mentioned in schedule-1A of the plaint. The defendants appeared and filed written statement. After framing of issues the defendants filed a petition before the court below to decide the maintainability of suit as preliminary issue. The learned court below as per order dated 11.06.2009 allowed the petition and fixed the case for hearing on preliminary issue. The petitioners being aggrieved by the said order filed a civil revision bearing No. 1356 of 2009. The said civil revision was subsequently ordered to be converted into a civil writ as per order dated 01.02.2012. It further appears that the court below as per order dated 12.01.2006 allowed the petition of the defendant filed under Order 14 Rule 2 of Code of Civil Procedure and fixed the case on 27.01.2006 for hearing on preliminary issue as to whether the suit is barred by limitation. Against the said order, the plaintiff filed CWJC No. 16033 of 2012.

3. Both the orders relate to fixing the case for hearing on maintainability of suit as preliminary issue and so both the writs have



been heard together and are being disposed of by this common order.

4. The learned counsel for the petitioners submits that the petitioners-plaintiffs have challenged the judgment and decree passed in Title Suit No.166/1970 as not binding on them. The petitioners were neither party to the suit nor they had any knowledge about the same. The petitioners got knowledge about the decree for the first time in the month of March 2003 and thereafter, they filed the aforesaid suit in the month of July 2003. According to section 59 of the Limitation Act, the period for setting aside the decree is 3 years from the date of knowledge and so the present suit is not barred by limitation. Besides the said relief, the petitioners have sought partition claiming half share in the suit property. The issue involved in the suit is based on law and fact and so it cannot be decided as preliminary issue. The order of court below fixing the case for hearing on limitation as preliminary issue is legally not sustainable.

5. The learned counsel for the respondents on the other hand submits that the plaintiffs had full knowledge about the earlier suit and so the said decree is binding on the plaintiffs. The present suit is barred by limitation and so the court below has rightly fixed the case for hearing on the point of limitation as preliminary issue.

6. On going through the submission of both the parties and documents on record, I find that the plaintiffs have filed the suit



for partition of suit property claiming half share in the property mentioned in schedule-Ka of the plaint. They further sought relief for declaration that the judgment-decree passed in T.S. No. 166 of 1970 as void, fraudulent and nullity. The defendants have filed written statement and the court below on the basis of pleadings of both the parties, has framed issue and one of the issue relates to maintainability of suit. The main contention of learned counsel for the petitioners is that the matter of limitation in filing the suit can't be decided without entering into the merit of the case. The issue involved in the suit appears to be mixed question of law and fact and so limitation matter cannot be decided as preliminary issue. The Hon'ble Apex Court in Ramesh B. Desai and others vs. Bipin Vadilal Mehta and others reported in AIR 2006 SC 3672 at para 12 has observed as follows:-

“Sub-rule (2) of Order XIV Rule 2 CPC lays down that 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 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 vs. Brig. F.J. Dillon, AIR 1964 SC 497, and it was held as under:-

“Under O. 14 R. 2 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 lop-sided trial of the suit.”

Though there has been a slight amendment in the language of Order XIV 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 issue 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.

7. The Hon’ble Apex Court has further observed that 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 plaintiff besides declaratory relief, has also prayed for partition of suit property



and so the court below has misdirected itself in fixing this case for hearing on preliminary issue.

8. In view of above facts and settled principle of law, the impugned order is set aside and these applications are allowed.

(Sanjay Kumar, J)

Mahesh/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	27/03/2018
Transmission Date	

