

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (227) No. 30 of 2018**

1. Toran Prasad, S/o. Late Prem Das, Aged about 70 years, R/o Village Kormi, District Bilaspur (C.G.)
2. Rajendra Prasad, S/o. Late Prem Das, Aged about 40 yers, Occupation – Farmer, R/o Village Kormi, District Bilaspur (C.G.)

----Petitioner/defendants**Versus**

1. Santosh Bai, Aged about 41 years, W/o Dhanraj, R/o Bitkuli, Tehsil, Bilha, PS:- Bilha, District Bilaspur (C.G.) (Plaintiff)
2. Suraj Bai, Aged about 75 years, W/o Late Ramji Satnami, R/o Bitkuli, Tehsil, Bilha, PS: Bilha, District Bilaspur (C.G.) (Defendant)
3. Aasin Bai, Aged about 43 years, D/o Late Ramji Satnami, through : Suruj Bai, R/oBitkuli, Tehsil, Bilha, PS:- Bilha, District Bilaspur (C.G.) (Defendant)
4. State of Chhattisgarh Through:- Collector, Bilaspur, District Bilaspur (C.G.)

---- Respondents

For Petitioner	: Shri Sunil Kumar Soni, Advocate.
For respondents No. 1 to 3	: Shri C.S. Bajpai, Advocate.
For Respondent No. 4	: Shri Rajendra Tripathi, PL

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****27/10/2018**

1. By the impugned order dated 29.11.2017, an application under Order 7 Rule 11 of the Code of Civil Procedure (henceforth "CPC") filed by petitioners / defendants No. 1 & 2 has been dismissed by the trial Court finding no merit, against which instant writ petition under Article 227 of the Constitution of India has been filed questioning the same.

2. Mr. Sunil Kumar Soni, learned counsel appearing for the petitioners would vehemently submit that the trial Court has erred in rejecting the application under

Order 7 Rule 11 of the CPC filed by petitioners/defendants, it ought to have granted application by holding that suit filed by respondent No. 1/plaintiff is barred by law & limitation and for want of cause of action. He would further submit that mother of defendants No. 1 & 2 filed a suit on 24.10.1988, in which, present plaintiff/respondent No. 1 filed a counter claim on 04.11.1988, but that civil suit was dismissed for want of prosecution under Order 9 Rule 8 of the CPC on 18.11.1993 and consequently the counter claim filed by present plaintiff is also dismissed. He would further submit that the as the present plaintiff/respondent No. 1 did not proceed with the counter claim, as such, the petitioners/defendants' No. 1 & 2 application under Order 7 Rule 11 of the CPC ought to have been allowed relying upon the judgment of the Supreme Court in the matter of **T. Arivandandam Vs. T.V. Satyapal and another** reported in **1977 (4) SCC 467**.

3. Per contra, counsel for respondents No. 1 to 3 would submit that the trial Court is absolutely justified in rejecting the petitioners' application under Order 7 Rule 11 of the CPC, which does not call for any interference under Article 227 of the Constitution of India.

4. I have heard learned counsel appearing for the parties and perused the order impugned with utmost circumspection.

5. It is true that in a suit filed by mother of defendants No. 1 & 2 on 24.10.1988, present plaintiff filed a counter claim for declaration of title and permanent injunction on 04.11.1988, but that suit was dismissed for want of prosecution under Order 9 Rule 8 of the CPC on 18.11.1993.

6. In the present suit filed by respondent No.1/plaintiff, objection is that since the

earlier counter claim filed by the plaintiff/respondent No. 1 was already dismissed and plaintiff did not proceed with the said counter claim under Order 8 Rule 6 (A) of the CPC, present suit filed by the plaintiff for the same relief is not maintainable, therefore, the petitioners' application under Order 7 Rule 11 CPC deserves to be allowed.

7. The civil suit filed by the mother of defendants No. 1 & 2 was dismissed in default on 18.11.1993 and consequently, plaintiff's counter claim was also dismissed and it was not decided on merits.

8. The Supreme Court in the matter of **Sheodan Singh Vs. Daryao Kunwar** reported in **AIR 1966 SC 1332** has held that principle of *res judicata* would not apply, if the decision in former suit is not on merits. It was observed as under :-

“13.....In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial Court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional Court-fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the

merits would not be *res judicata* in a subsequent suit.”

9. Likewise question of limitation is mixed question of law and fact, which can be taken care of by the trial Court by framing issue and after recording evidence of the parties. Thus, I do not find any illegality in the order impugned warranting interference by this Court under Article 227 of the Constitution of India.

10. Accordingly, the writ petition fails and is hereby dismissed. However, since the suit was filed by the plaintiff on 31.07.2006, the trial Court is directed to conclude the same within a period of three months from the date of receipt of certified copy of this order.

11. Copy of this order be sent to the trial Court through concerned District Judge to do the needful.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

