

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.149 of 2014

1. Narendra Kumar Dwivedi Son of Dr. Shyamanand Dwivedi
 2. Sanjay Kumar Dwivedi Son of Narendra Kumar Dwivedi
 3. Sandeep Kumar Dwivedi Son of Narendra Kumar Dwivedi
 4. Ashish Kr Dwivedi Son of Narendra Kumar Dwivedi All R/o Bagaha Bazar, P.S. Bagaha, District West Champaran.
-Defendant Nos. 1 to 4.....Petitioners

Versus

1. Rajesh Dwivedi Son of Late Satyendra Kumar Dwivedi
 2. Rakesh Kumar Dwivedi Son of Late Satyendra Kumar Dwivedi Both R/o Bagaha bazar, P.S. Bagaha, District West Champaran.
-Plaintiffs.....opposite parties.
3. Smt Anita Devi Wife of Sri Vijay Bahadur Dubey and d/o Sri Narendra Kumar Dwivedi R/o Niyamak Chak, Gorakhpur, P.S. Gorakhpur, District Gorakhpur, U.P.
 4. Smt Vinita Devi Wife of Sri Anupam Dubey and d/o Late Satyendra Kumar Dwivedi R/o Mathiya Bujurg, P.O. Khadda, P.S. Khadda, District Kushinagar U.P. presently residing at Mohalla Bettiah Hata, P.O. and P.S. Gorakhpur, District Gorakhpur U.P.
 5. Smt Sunita Devi Wife of Ajay Dubey and daughter of Late Satyendra Kumar Dwivedi R/o Mathiya Bujurg, P.O. and P.s. Khadda, District Kushinagar U.P. presently residing at Mohalla Niyamak chak, P.O., P.S. and District Gorakhpur U.P.
-Defendant Nos. 5 to 7opposite parties.
6. Seema Dwivedi @ Seema Chaturvedi Wife of Sri Vikash Chaturvedi and D/o Late Satyendra Kumar Dwivedi R/o Mohalla Deyari Colony, Shahpur, P.O. and P.s. Gorakhpur, District Gorakhpur U.P.
 7. Jyoti Dwivedi @ Jyoytidata Widow of Late Manish Datta Pandey and daughter of Late Satyendra Kumar Dwivedi R/o Bettiah Hata, P.O. and P.S. Gorakhpur, District Gorakhpur U.P.
- Defendant Nos. 8 and 9..... opposite parties.

Appearance :

For the Petitioner/s	:	Mr.Ganpati Trivedi, Sr. Adv.
	:	Mr. Sanjay Kumar Pandey, Adv.
	:	Mr. Manoj Kumar, Adv.
For the Respondent/s	:	Mr. Dhananjay Kumar No. 2, Adv.

CORAM: HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

Date : 01-08-2019



Heard the parties.

2. This civil revision petition has been filed for setting aside the order dated 26.08.2014 passed by Sub-Judge-II, Bagha, West Champaran in Partition Suit No. 128 of 2012 by which application filed by defendant Nos. 1 to 4 under Order VII Rule XI of CPC for rejection of the plaint has been rejected.

3. Plaintiffs have filed a partition suit No. 128 of 2012 for partition of suit properties as described in Schedule II to V of the plaint as well as for setting aside the order dated 27.12.05 and preliminary decree dated 08.12.2006 passed in Partition Suit No. 106/2003 based upon compromise.

4. Plaintiffs and defendants are descendants of common ancestor Dr. Shyamanand Dwivedi and schedule II property was his self acquired property and after his death in 1992 same was inherited by his two sons Narendra Kumar Dwivedi and Satyendra Kumar Dwivedi. Schedule-III property was gifted to Uma Devi daughter of Dr. Shyamanand Dwivedi who died on 25.05.2012 issueless and her husband had deserted her and she was residing in her parental home and as such after her death her properties devolved upon plaintiffs and defendants which is schedule III properties of the plaint.

5. Plaintiffs have also challenged deed of gift dated



17.04.1963 executed by defendant No. 1 in favour of defendant No. 2 as a forged, fabricated and void document and gifted properties are joint family properties liable for partition as detailed in schedule IV of the plaint.

6. It has been stated in plaint that Satyendra Kumar Dwivedi father of the plaintiffs was suffering from mental illness since 1987 and taking advantage of his unsoundness of mind a forged partition suit No. 106/2003 was filed in the court of Sub-Judge, Bagha which was decreed on compromise by order dated 27.12.2005 and 08.12.2006 and an amendment petition was subsequently filed for amendment of order and decree by which addition of some properties are sort giving rise to miscellaneous case No. 1 of 2007 which is still pending before Sub-Judge. Satyendra Dwivedi father of plaintiffs died on 25.05.2012 and present suit has been filed after his death.

7. Defendants appeared and filed an application under Order VII Rule XI of CPC to reject the plaint as no cause of action has been disclosed in the plaint for filing the suit and suit is barred by res judicata as well as limitation. Plaintiffs have filed the suit for partition as well as setting aside the judgment and decree passed in Partition Suit No. 106/2003 in which defendant No. 1 of present suit was plaintiff and father of



plaintiffs of present suit was defendant No. 1 and his sons who are plaintiffs in this suit were defendant Nos. 2 and 3 and Uma Devi was also defendant in said suit which was decreed on basis of compromise and after more than one year an application was filed for amendment of preliminary decree to add some of the joint family properties which was not included in said partition suit giving rise to miscellaneous case No. 01/2007.

8. Trial court has held that earlier partition suit No. 106/2003 was filed which was decreed and present suit has been filed for setting aside judgment and decree of said partition suit. The defendants have pleaded that plaintiffs did not prefer any appeal against said judgment and decree within the limitation period rather they filed an application for amendment of preliminary decree giving rise to miscellaneous case No. 01/2007 to add some properties in the plaint of earlier partition suit which is still pending before Sub-Judge-I, Bagha. Parties as well as properties in the present suit and previous suit are same, as such, subsequent suit is barred by res judicata. No suit can be filed against a compromise decree by a person who was party in said partition suit as such present suit is not maintainable.

9. The trial court has dismissed the application filed by defendant Nos. 1 to 4 on the ground that any cause of action



for filing the suit can be decided during the trial and not at this stage. Court while considering an application under Order VII Rule XI CPC is only to see whether any cause of action is disclosed in the plaint and secondly whether the suit is barred by any law or not and on either of the ground the plaint can be rejected which is not available/existing in present case. Cause of action are bundle of facts which a plaintiff needs to establish and same cannot be decided whether it is true or untrue at this stage and accordingly rejected the application filed by defendants.

10. It appears that trial court has committed an error of record as in their application under Order VII Rule XI of CPC defendants have taken a specific plea that suit is barred by res judicata as well as limitation. It is true that res judicata is a mixed question of law and fact, however, limitation is question of law and if from pleading of the plaint it appears that suit is barred by limitation plaint can be rejected under Order VII Rule XI of CPC. Suit can be also dismissed if it appears to be vexatious.

11. The trial court has not considered the application filed by defendant Nos. 1 to 4 under Order VII Rule XI of CPC in true perspective. However, since the impugned order is dated



16.08.2014 and trial must have proceeded to a great extent as such, this Court is not inclined to interfere in the impugned order at this stage. Liberty is granted to the defendant Nos. 1 to 4/petitioners to raise this issue to be decided as a preliminary issue under Order 14 Rule 2 of CPC after issues are framed by the trial court.

12 With said observation and liberty, the present revision petition is disposed of.

(S. Kumar, J)

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AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	28.10.2019
Transmission Date	N.A.

