

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVIEW No.478 of 2016

In
FIRST APPEAL No.263 of 2007

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1. Janki Mahto Son of Late Hari Mahto
 2. Suryadeo Prasad @ Suryadeo Verma Son of Janki Mahto @ Janki Prasad.
 3. Arvind Prasad Son of Janki Mahto.
 4. Shakuntala Devi Wife of Janki Mahto.
 5. Prakash Prasad Son of Arvind Prasad
 6. Randhir Prasad Son of Arvind Prasad
resident of Village- Makanpur, P.S.- Noorsarai, District- Nalanda.

... .. Defendants-Appellants-Petitioners
Versus

1. Archana Kumari @ Pali Devi Wife of Surajdev Prasad @ Suryadeo Verma.
2. Nishu Kumari, D/o- Surajdev Pd. minor under guardianship of Mother Archana Kumari @ Pali Devi, Both resident of Village Makanpur, Post Barara, P.S. Noorsarai, District Nalanda.

... ..Plaintiff-Respondents-Opposite Parties

Appearance :

For the Petitioners	:	Mr. Sanjay Prasad, Adv.
For the Respondents	:	Mr. Kumar Kaushik, Adv.
		Mrs. Namrata Dubey, Adv.

CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

CAV JUDGMENT

Date : 03-04-2019

1. This review petition has been preferred against the judgment dated 31.03.2011 passed by a Co-ordinate Bench of this Court in F.A. No. 263 of 2007 by which and whereunder he dismissed the above stated F.A. No. 263 of 2007 confirming the judgment and decree passed by learned Sub Judge-I, Biharsharif, Nalanda in Title Suit No. 163 of 2004.

2. Briefly stated the fact of the case is that the opposite parties filed Title Suit No. 163 of 2004 against the petitioners



(except petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma) claiming $\frac{1}{4}^{\text{th}}$ share in the suit property mentioned in Schedule-I and II of the plaint. They claimed that opposite party no. 1, namely, Archana Kumari @ Pali Devi is legally wedded wife whereas opposite party no. 2, namely, Nishu Kumari is minor daughter of petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma. They further claimed that they are members of joint Hindu family governed by Mitakshra School of Hindu Law along with petitioners. Furthermore, they claimed that above stated petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma went to Bombay in December 1996 for earning and since then he is traceless. Since more than seven years have already been passed and, therefore, the civil death of petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma be presumed and the suit property as mentioned in Schedule-1 and II of the plaint be partitioned. The petitioners (except petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma) appeared and contested the aforesaid suit taking various grounds. The learned Sub Judge after framing necessary issues decreed the above stated suit coming to conclusion that defendants of the aforesaid suit could not succeed to prove that petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma is alive and accordingly, a decree for partition



was passed vide judgment and decree dated 28.09.2007 which was challenged by the petitioners (except petitioner no. 2) by filing F.A. No. 263 of 2007 which was, too, dismissed by a co-ordinate Bench of this court vide judgment dated 31.03.2011 against which this review petition has been preferred by the petitioners.

3. Learned counsel appearing for the petitioners submits that petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma is alive but at the time of passing judgment and decree dated 28.09.2007, his whereabouts could not be ascertained. However, subsequently, petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma came to his parental home and then it came to light that petitioner no. 2 is alive. He submitted that petitioners (except petitioner no. 2) could not succeed to bring to the notice of the court that petitioner no. 2 is alive even they had taken sincere efforts to trace the whereabouts of petitioner no. 2 as a result whereof, the learned Sub Judge presumed the civil death of petitioner no. 2 under Section 108 of the Evidence Act and after presuming his civil death, a decree of partition was passed in favour of opposite parties. He submitted that admittedly, the opposite parties claimed partition of joint family property being wife and daughter of petitioner no. 2 and it is also an admitted position that they had no right to file partition suit for partition of



joint family property in the lifetime of petitioner no. 2 and now, it has been discovered that petitioner no. 2 is alive and, therefore, the judgment and decree passed in Title Suit No. 163 of 2004 as well as judgment dated 31.03.2011 passed in F.A. No. 263 of 2007 is not in accordance with law and there is apparent error on the face of the record. Learned counsel of the petitioners referred the decision of **R. Gopala Pathar vs. N. Jayalakshmi Ammal and others** reported in AIR 1984 Madras 340 and submitted that in the aforesaid case, the Hon'ble Madras High Court has clearly held that "wife is not entitled to inherit the joint family property in the lifetime of her husband." The perusal of case of **R. Gopala Pathar (Supra)** goes to show that the aforesaid cited case is not applicable in the facts of the present case because in that case, the Hon'ble Madras High Court held that under Section 108 of the Evidence Act, there is only presumption of death and there is no presumption of actual date of death under Section 108 of the Evidence Act.

4. Learned counsel of the petitioners also submitted that as a matter of fact, petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma returned to his village on 17.10.2016 and thereafter, this fact came to notice of petitioners (except petitioner no. 2) that Suryadeo Prasad @ Suryadeo Verma is alive and



thereafter, they along with aforesaid Suryadeo Prasad @ Suryadeo Verma filed the present review petition on 25.10.2016 and, therefore, there is no delay in filing the present review petition. He submitted that however, petitioners have filed I.A. No. 9864 of 2016 under Section 5 of Limitation Act for condonation of delay, if any, in filing the aforesaid review petition. He further submitted that petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma was not party to the aforesaid Title Suit No. 163 of 2004 and, therefore, there was no occasion to serve any notice to him. He submitted that petitioner no. 2 is an aggrieved person as his right and title in respect of the suit property is affected, if the impugned judgments passed by appellate court as well as learned Sub Judge are not set aside and, therefore, petitioner no. 2, too, has right to file review petition.

5. On the other hand, learned counsel appearing for the opposite parties refuted the above stated submissions submitting that the instant review petition is highly time barred as the review petition has been preferred after more than five years from the date of passing judgment in F.A. No. 263 of 2007 and no sufficient reasons have been given for condonation of delay. He, further, submitted that admittedly, petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma was not party to Title Suit No. 163 of



2004 and, therefore, he has no locus standi to file review petition. In support of his contention, he referred the decision of **Bharat Singh vs Sheo Parshad Giani Ram and others** reported in AIR 1978 Delhi 122 wherein Hon'ble Delhi High Court has held that "a review application can be filed only by a party to the lis in which the order sought to be reviewed has been passed." He also referred the case of **Bangalore Development Authority vs. P. Anjanappa (Deceased) by L.Rs** decided on 07.01.2003 in Review Petition Nos. 251 and 752 of 2002 by Hon'ble the High Court of Karnataka at Bangalore wherein at para 11 of the aforesaid judgment, the Hon'ble Karnataka High Court has held that "a review application can be filed only by a party to the lis in which the order sought to be reviewed has been passed and it cannot be preferred by a third party." He, further, submitted that admittedly, the opposite parties filed Title Suit No. 163 of 2004 against the petitioners (except petitioner no. 2) in the year 2004 claiming their 1/4th share in suit property on the ground that petitioner no. 2 was traceless for more than seven years and under Section 108 of the Evidence Act, there was presumption of his civil death. He further submitted that petitioner no. 2 left his village in the year 1996 and remained traceless for near about 20 years and the contesting defendants of Title Suit No. 163 of 2004



could not succeed to prove that petitioner no. 2 was alive and, therefore, the learned trial court rightly presumed the civil death of petitioner no. 2 under Section 108 of the Evidence Act and, therefore, there is no apparent error on the face of the record. He further submitted that all of a sudden petitioner no. 2 surfaced and along with other petitioners filed this review petition which cannot be entertained.

6. Having heard the contentions of both the parties, I went through the record. It is an admitted position that opposite parties filed Title Suit No. 163 of 2004 claiming their $\frac{1}{4}^{\text{th}}$ share in the suit property on the ground that petitioner no. 2 was traceless for more than seven years and there was presumption of his civil death under Section 108 of the Evidence Act. Furthermore, it is an admitted position that learned Sub Judge having presumed civil death of petitioner no. 2 under Section 108 of the Evidence Act decreed the Title Suit No. 163 of 2004 passing judgment and decree dated 28.09.2007 against which the petitioners (except petitioner no. 2) filed F.A. No. 263 of 2007 which, too, dismissed vide judgment dated 31.03.2011. Furthermore, it is an admitted position that on 25.10.2016 i.e. more than after five years of passing the judgment in F.A. No. 263 of 2007, petitioners preferred the present review petition. It is also an admitted position



that petitioner no. 2 was not party either to Title Suit No. 163 of 2004 or in F.A. No. 263 of 2007 and, therefore, he has no right to file review petition against the judgment passed in F.A. No. 263 of 2007 as well as against the judgment and decree dated 28.09.2007 passed in Title Suit No. 163 of 2004. No doubt, Order 47 Rule 1 of the Civil Procedure Code says that any person considering himself aggrieved may file review petition but the word “aggrieved” does not cover a stranger to the lis. For better appreciation, it would be proper to reproduce Order 47 Rule 1 of the Civil Procedure Code which runs as follows:-

1. Application for review of judgment-(1) *Any person considering himself aggrieved,-*

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some



mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

7. The bare perusal of the aforesaid provision goes to show that the person applying for review has to satisfy two conditions normally that he is aggrieved by the order and also that he for the reasons mentioned was not in a position to bring that fact to the notice of the court earlier which resulted in a wrong order being passed. The aforesaid two conditions go to show that the review petition has to be made by a person who was party to the lis and the stranger to the suit has no right to file review petition. Therefore, in my view, petitioner no. 2 has no locus standi to file present review petition. However, it is well settled principle of law that if a decree or order adversely affecting a person who is not a party to the lis in which that order or decree has been passed, is not binding on him and, therefore, he has no right to file review petition against the said decree or order though he may take such other steps as may be available to him in law to protect his rights.

8. Furthermore, Order 47 Rule 1 of the Civil Procedure Code goes to show that on discovery of new and important matter



or evidence which, after the exercise of due diligence, could not be produced at the time when the decree was passed or order was made, the aggrieved person has right to file review petition. The above stated provision also goes to show that mere discovery of new and important matter or evidence does not give right to party to the lis to file review against the decree or order and to obtain a review of the decree passed or order made, the applicant has to satisfy the court that even after the exercise of due diligence, the new and important matter or evidence could not be produced before the court or the discovered fact or evidence was not within his knowledge. In the present case, the petitioners (except petitioner no. 2) claimed before the learned Sub Judge that petitioner no. 2 used to visit his village and they had met petitioner no. 2 but even then they could not succeed to trace the whereabouts of petitioner no. 2. Therefore, it cannot be said that petitioners (except petitioner no. 2) could not succeed to discover the evidence in respect of petitioner no. 2 after the exercise of due diligence or it was not to their knowledge that petitioner no. 2 was alive when the judgment and decree was passed by the learned Sub Judge-I and, therefore, in my view, petitioners have no right to seek review of the judgment dated 31.03.2011 passed in F.A. No.



263 of 2007 as well as judgment and decree dated 28.09.2007 passed in Title Suit No. 163 of 2004.

9. It is an admitted position that judgment and decree in Title Suit No. 163 of 2004 was passed on 28.09.2007 and the judgment in F.A. No. 263 of 2007 was passed on 31.03.2011 whereas the present review petition was filed on 25.10.2016 i.e. after more than five years from the date of passing judgment in F.A. No. 263 of 2007 and, therefore, the present review petition is highly time barred and no sufficient explanation of the aforesaid delay has been given by the petitioners.

10. Section 107 of the Indian Evidence Act, 1872 says that “when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. There is a proviso of the aforesaid section which has been described in Section 108 of the Indian Evidence Act which says that “the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. Therefore, it is obvious from perusal of the aforesaid provisions that if a person is not heard of for seven years by those who would naturally have



heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms that he is alive. Therefore, it is obvious that for the application of Section 108 of the Evidence Act, the minimum period of time limit statutorily prescribed for the presumption to arise is seven years. No doubt, the aforesaid presumption is always rebuttable but in the present case, admittedly, the petitioners could not succeed to rebut the aforesaid presumption and, therefore, after expiry of more than five years of passing judgment in F.A. No. 263 of 2007, they have no right to seek further chance to rebut the above stated presumption.

11. On the basis of aforesaid discussions, I am of the opinion that the present review petition is devoid of merit and is liable to be dismissed being highly time barred. Therefore, the present review petition as well as I.A. No. 9864 of 2016 stand dismissed on admission stage itself. However, it is made clear that if petitioner no. 2, namely, Suryadeo Prasad @ Suryadeo Verma takes steps for avoiding the impact of judgment and decree dated 28.09.2007 passed in Title Suit No. 163 of 2004 and judgment dated 31.03.2011 passed in F.A. No. 263 of 2007 in accordance with law, the observations/findings given in this judgment shall not affect the right of petitioner no. 2.



12. In the aforesaid manner, this review petition along with I.A. No. 9864 of 2016 stand disposed of.

(Hemant Kumar Srivastava, J)

shahzad/-

AFR/NAFR	A.F.R.
CAV DATE	28.11.2018
Uploading Date	04.04.2019
Transmission Date	N.A.

