

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WP227 No. 717 of 2019

- Shyamal Mallik S/o Late Santosh Mallik Aged About 52 Years R/o Durpa Road, Korba, Tahsil and District Korba, Chhattisgarh

---- Petitioner

Versus

1. Mamta Das, D/o Late R. Das Aged About 39 Years Caste Panika,
2. (Minor) Mimansha Mallik, D/o Shri Shyamlal Mallik, Aged About 10 Years, Through Natural Guardian Mother Mamta Das, Aged About 39 Years, D/o Late C.R. Das,
Both R/o Indira Market, Behind Sector- 16, Balco Nagar, Tahsil And District Korba, Chhattisgarh.

---- Respondents

For Petitioner	: Mr. Malay Bhaduri, Advocate along with Shri Shubham Deo Malick, Advocate
For Respondents	: Dr.N.K. Shukla, Sr. Advocate along with Shri Priyankesh Chandrakar, Advocate

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order on Board

14-10-2019

1. This petition has been brought for challenging the order dated 26.08.2019, passed by Principal Judge, Family Court, Korba, C.G. in Civil Suit No.71A/2017, by rejecting the application filed by the petitioner under Article 58 Schedule of Limitation Act read with Section 3 of the Constitution of India.
2. It is submitted by learned counsel for the petitioner that respondents have filed the Civil Suit praying for relief of declaration, that Respondent No.2 is illegitimate child of the petitioner. The birth year of the Respondent No.2 is 2008. Earlier an application was filed praying for grant of maintenance against the petitioner by the respondents in the year 2009, which was registered as Miscellaneous Criminal Case No.50/2009, that application was rejected by order dated 22.02.2012.

this order was challenged before this Court in Revision Petition No.179/2012, in which, by order dated 04.02.2013, this Court has dismissed the prayer of the respondents for conducting DNA test, to determine paternity of Respondent No.2. Thereafter, the respondents preferred a Special Leave to appeal before the Supreme Court of India, which has been dismissed on 31.05.2013. It is further submitted that in the back drop of these events, the petitioner again filed an application under Section 3 read with Article 58 of the Indian Limitation Act, before the Family Court, Korba, and the same has been dismissed by the impugned order. Placing reliance in the judgment of Supreme Court in **Khatri Hotels Private Limited Vs. Union of India**¹, it is submitted that Article 58 of the Schedule under Limitation Act, that there is specific provision that to obtain any other kind of declaration, the period of limitation is three years, since the date when right to sue accrues first. It is submitted that the paternity of Respondent No.2 has been disputed from the year 2009, when this petitioner has challenged the same, in his reply to the petitioner under Section 125 of the Cr.P.C. In the order dated 04.02.2013, this Court had clearly observed that in the revision petitioner/respondent in this case, can file a suit for declaration under Section 34 of the Specific Relief Act for getting relief of declaration regarding the status of Respondent No.2, as an illegitimate child. Despite that, the Civil Suit has been filed in the year 2017, and there is no reason to explain the delay, hence, it is prayed that this Court should exercise its jurisdiction of Article 227 of Constitution of India to interfere with the impugned order.

3. Learned Senior Counsel appearing on behalf of the Respondents submitted that no separate application can be filed under Section 3 read with Article 58 Schedule under the Indian Limitation Act or order 7 Rule

¹ AIR 2011 SC 3590

11 Clause D of CPC, very clearly provides that where the suit appears from the statement in the plaint to be barred by any law, in that case, the application can be moved praying for rejection of plaint. The petitioner had already moved such application under order 7 Rule 11 of the CPC taking recourse of the same ground of the suit being barred by limitation. That application has been rejected by the Family Court vide order dated 04.09.2018, subsequent to which, the petitioner filed a Writ Petition before this Court, which was disposed of by order dated 05.10.2018, by restoring the application under order 7 Rule 11 of the CPC and directing the Family Court to re-consider on the same application. Subsequent to which, the learned Judge of Family Court has again considered the application of the petitioner and dismissed the same on 25.06.2019.

4. It is submitted by the learned Senior Counsel for the Respondents that there is mention of the rejection of applications filed by the petitioner under order 7 Rule 11 of the CPC, in the impugned order. Apart from that the petitioner has himself challenged the order dated 25.06.2019 by filing a Writ Petition 227 which is registered as WP227 No.585 of 2019 and pending for final disposal. Therefore, the earlier order passed by the Court below and also for the reasons that the challenge to that order is pending before this Court that appears as *res judicata* because of which by making a mention of different provisions of law same prayer cannot be made repeatedly and entertained by a Court. It is also submitted that the question of limitation is a mixed question of law and fact which cannot be decided at any preliminary stage, hence, it is prayed that is without any substance which may be dismissed.
5. In reply of this learned counsel for the petitioner submits that no grounds are mentioned for the rejection of application filed by the petitioner in the

impugned order, therefore, it is an order without merits. It is also submitted that there is no applicability of principal of *res judicata* in this case because this is a separate application filed by the petitioner.

6. Heard both counsel for the parties and perused the material available on record.
7. The application under Section 3 read with Article 58 of Schedule under Indian Limitation Act has been dismissed by the impugned order in which the reasons are very clearly mentioned that the same ground was raised by the petitioner in his application under order 7 Rule 11 of the CPC which has already been dismissed by the same Court, therefore, the Court cannot review the same order.
8. The earlier application that was filed by the petitioner under order 7 Rule 11 of the CPC very clearly included a ground that the suit filed by the respondents are barred by limitation, on making such prayer it reflects that the statement so made is based on the provisions of limitation Act itself. As the question of limitation was already raised by the petitioner in his application under order 7 Rule 11 of the CPC, which has been decided by the Family Court and the order is presently under challenge before the High Court in Writ Petition 227 No.585 of 2019, therefore, the same subject could not have been made a ground to file another application by making reference of making different provisions of law. There is no denial from the petitioner side regarding the earlier rejection of the application under order 7 Rule 11 of the CPC, and regarding the pendency of the Writ Petition challenging that order.
9. For the reasons that question of limitation raised by the petitioner has already been decided by the Family Court and the Writ Petition filed against that order is pending before this Court, therefore, this Court or Family Court is not in a position to take into consideration or re-consider

as to whether the suit is barred by limitation, and that, apart of the application filed by the petitioner under Section 3 read with Article 58 under the Schedule of Indian Limitation Act, was mis conceived, which should not have been entertained by the Family Court, therefore, impugned order has been rightly passed and could not be interfered with.

10. Hence, this petition is dismissed at motion stage itself.

yasmin

Sd/-
(Rajendra Chandra Singh Samant)
Judge