

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO. 1187 OF 2022

Jaikishan @ Jaya Kisan Agrawal* *Petitioner
Mr. Anam Charan Panda, Advocate

-versus-

Narendra Naik and others* *Opp. Parties

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER

09.12.2022

Order No.

1. This matter is taken up through hybrid mode.
2. This CMP has been filed assailing the order dated 11th November, 2022 (Annexure-7) passed in CRP No.01 of 2020, whereby learned Additional District Judge, Dharamgarh while dismissing the revision confirmed the order dated 18th January, 2020 (Annexure-4) passed by learned Civil Judge (Junior Division), Dharamgarh in Title Suit No. 11/23 of 1989-90 rejecting an application filed under Order VII Rule 11(d) C.P.C. by the Petitioner.
3. Mr. Panda, learned counsel for the Defendant No.2-Petitioner submits that on a plain reading of the plaint, it appears that the suit is barred by limitation. Further, a bald allegation of fraud has been made without any detail particulars in the pleading to that effect. Hence, the suit is not maintainable. He further submits that although the suit has been filed since 1989, but it was dismissed for default and was restored after fourteen years. The pleadings of the suit are not complete as yet. Neither learned trial Court nor revisional Court has taken into

consideration the settled position of law in the case of ***Dahiben –v- Arvindbhai Kalyanji Bhanusali (Gajra) (D) The LRS & others***, reported in (2020) 7 SCC and in the case of ***C.S. Ramaswamy –v- V.K. Senthil and others***, reported in 2022 SCC OnLine SC 1330. Although the revisional Court took note of the case laws (supra) but failed to discuss the same. Had the case of the Petitioner been considered in the light of the ratio decided in the aforesaid two case laws, the result might have been different. He, therefore, prays for setting aside the impugned order under Annexure-7 and to remit the matter back to the learned revisional Court for fresh adjudication of the petition under Order 7 Rule 11 (d) C.P.C.

4. Upon hearing learned counsel for the Petitioner and on perusal of the record, it appears that the revisional Court has taken note of the aforesaid case laws, but has not discussed the same.

5. In the case of *Dahiben* (supra), wherein the Hon'ble Supreme Court at paragraphs-25 to 28 has held as under:

25. The Limitation Act, 1963 prescribes a time-limit for the institution of all suits, appeals, and applications. Section 2(j) defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suits, appeals or applications. Section 3 lays down that every suit instituted after the prescribed period, shall be dismissed even though limitation may not have been set up as a defence. If a suit is not covered by any specific article, then it would fall within the residuary article.

26. Articles 58 and 59 of the Schedule to the 1963 Act, prescribe the period of limitation for filing a suit where a declaration is sought, or cancellation of an instrument, or rescission of a contract, which reads as under:

<i>“Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
58. To obtain any other declaration.	Three years	When the right to sue first accrues.
59. To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.”

The period of limitation prescribed under Articles 58 and 59 of the 1963 Act is three years, which commences from the date when the right to sue first accrues.

27. In Khatri Hotels (P) Ltd. v. Union of India [Khatri Hotels (P) Ltd. v. Union of India, (2011) 9 SCC 126 : (2011) 4 SCC (Civ) 484] this Court held that the use of the word “first” between the words “sue” and “accrued”, would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. That is, if there are successive violations of the right, it would not give rise to a fresh cause of action, and the suit will be liable to be dismissed, if it is beyond the period of limitation counted from the date when the right to sue first accrued.

28. A three-Judge Bench of this Court in State of Punjab v. Gurdev Singh [State of Punjab v. Gurdev Singh, (1991) 4 SCC 1 : 1991 SCC (L&S) 1082] held that the Court must examine the plaint and determine when the right to sue first accrued to the plaintiff, and whether on the assumed facts, the plaint is within time. The words “right to sue” mean the right to seek relief by means of legal proceedings. The right to sue accrues only when the cause of action arises. The suit must be instituted when the right asserted in the suit is infringed, or when there is a clear and unequivocal threat to infringe such right by the defendant against whom the suit is instituted. Order 7 Rule 11(d) provides that where a suit appears from the averments in the plaint to be barred by any law, the plaint shall be rejected.”

6. In the case of C.S. Ramaswamy (supra), the Hon’ble Supreme Court at paragraphs-30 and 31 held as under:

30. Even the averments and allegations with respect to knowledge of the plaintiffs averred in paragraph 19 can be said to be too vague. Nothing has been mentioned on which date and how the plaintiffs had the knowledge that the document was obtained by fraud and/or misrepresentation. It is averred that the alleged fraudulent sale came to the knowledge of the plaintiffs only when the plaintiffs visited the suit property. Nothing has been mentioned when the plaintiffs visited the suit property. It is not understandable how on visiting the suit property, the plaintiffs could have known the contents of the sale deed and/or the knowledge about the alleged fraudulent sale.

31. Even the averments and allegations in the plaint with respect to fraud are not supported by any further averments and allegations how the fraud has been committed/played. Mere stating in the plaint that a fraud has been played is not enough and the allegations of fraud must be specifically averred in the plaint, otherwise merely by using the word “fraud”, the plaintiffs would try to get the suits within the limitation, which otherwise may be barred by limitation. Therefore, even if the submission on behalf of the respondents - original plaintiffs that only the averments and allegations in the plaints are required to be considered at the time of deciding the application under Order VII Rule 11 CPC is accepted, in that case also by such vague allegations with respect to the date of knowledge, the plaintiffs cannot be permitted to challenge the documents after a period of 10 years. By such a clever drafting and using the word “fraud”, the plaintiffs have tried to bring the suits within the period of limitation invoking Section 17 of the limitation Act. The plaintiffs cannot be permitted to bring the suits within the period of limitation by clever drafting, which otherwise is barred by limitation. At this stage, a recent decision of this Court in the case of Raghwendra Sharan Singh (supra) is required to be referred to. In the said decision, this Court had occasion to consider all earlier decisions on exercise of powers under Order VII Rule 11 CPC, which are considered by this Court in paragraphs 6.4 to 6.9 ”

7. In the case of *Dahiben* (supra), it is held that the period of limitation prescribed under Articles 58 and 59 of the Limitation, 1963 is three years which commences from the date when the right to sue first accrue. It is also trite law that period of limitation once commenced, cannot be suspended or paused. In the case of *C.S. Ramaswamy* (supra), the Hon'ble Supreme Court has held that allegation of fraud without any supporting material particulars in the pleadings as to how the fraud has been committed/played is not enough and the allegations of fraud must be specifically averred in the plaint, otherwise merely by using the word "fraud", the Plaintiffs would try to get the suits within the limitation, which otherwise may be barred by limitation. These vital aspects having not been considered by the revisional Court before whom the case laws were pressed into the service, this Court feels that the matter requires fresh consideration giving opportunity of hearing to the parties concerned.

8. In that view of the matter, this Court, keeping in mind that the suit is of the year, 1989 and the case laws cited above are not taken into consideration by the revisional Court, without issuing notice to the Opposite Parties sets aside the impugned order under Annexure-7 to avoid further delay in the matter. Accordingly, while setting aside the impugned order under Annexure-7, the matter is remitted back to the learned Additional District Judge, Dharamgarh to consider the revision afresh giving opportunity of hearing to the parties, keeping in mind the case laws cited (supra) and taking into consideration the arguments to be advanced by learned counsel for the parties.

9. It is made clear that this Court has not expressed any opinion on the merits of the case of the Petitioner.

10. Since the CMP is disposed of without issuing notice to the Opposite Parties, they are at liberty to move this Court for variation of this order, if they feel aggrieved. The Petitioner may appear before the revisional Court on 19th December, 2022 to receive further instruction in the matter.

11. With the aforesaid observation and direction, the CMP is disposed of.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

bks

