



**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**CMP No.1036 OF 2022**

*(An application under Article 227 of the Constitution of India)*

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***Kaupin Dhari Mahima Samaj and others*** .... ***Petitioners***

Mr. Gajendranath Rout, Advocate

*-versus-*

***Satya Mahima Dharma Dham Parichalana Samiti & Ors.*** .... ***Opp. Parties***

*Advocates appeared:*

*For Petitioners* : Mr. Gajendranath Rout, Advocate,

*For Opp. Parties* : Mr. Dwarika Prasad Mohanty, Advocate

**CORAM:**

**JUSTICE K.R. MOHAPATRA**

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Heard and disposed of on 05.04.2024

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**J U D G M E N T**

**IA No.368 of 2024 & CMP No.1036 OF 2022**

1. This matter is taken up through hybrid mode.
2. The CMP is listed today for consideration of IA No.368 of 2024 filed with a prayer for extension of interim order dated 26<sup>th</sup> October, 2022 passed in IA No.1123 of 2022.
3. In course of hearing of the IA, this Court finds that merit of the case has to be gone into. Hence, on consent of learned counsel for the parties, the CMP is taken up for final disposal.



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4. This CMP has been filed assailing order dated 30<sup>th</sup> September, 2022 (Annexure-5) passed by learned Civil Judge (Junior Division), Gondia, Dhenkanal in CMA No.10 of 2022 (arising out of CMA No.8 of 2009), whereby an application to restore CMA No.8 of 2009 filed under Section 47 CPC has been rejected.

5. Mr. Rout, learned counsel for the Petitioners submits that TS No.33 of 1988 was filed by Plaintiffs for declaration of joint title and confirmation of possession of the Plaintiffs-Opposite Parties over the suit land in Plot No.1443 and for permanent injunction against the Defendants restraining them from constructing any wall or construction over any part of the said plot and from disturbing the very passage of the Plaintiffs over the said Plot No.1443 under Khata No.13 measuring an area Ac.0.08 decimal in village Joranda in the district of Dhenkanal. Vide Judgement dated 31<sup>st</sup> July, 1990, the suit was decreed with the following order:-

*“That the suit be and the same is decreed on contest against the defendants with the cost. No order is passed regarding declaration of joint title and confirmation of possession of the plaintiffs over Plot No.1443 as it is already decided by the Hon’ble High Court. The defendants are restrained from constructing any wall or any structure on any part of plot No.1443 and also enjoined not to obstruct the free passage of the plaintiffs to plot No.1443 and are directed to remove the existing wall at its northern side.”*

The Defendants unsuccessfully challenged the decree in appeal. Thereafter, Plaintiffs filed Execution Case No.3 of 2001 alleging that the Defendants have constructed a wall over Plot No.1443



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and obstructed passage of the Plaintiffs/Opposite Parties. Defendants/JDr. appeared and filed an application in CMA No.8 of 2009 under Section 47 CPC. In the meantime, JDr. Nos.1 and 2 died and JDr. No.3 renounced the world, as a result of which, CMA No.8 of 2009 was dismissed being not moved. Thereafter, the DHrs./Opposite Parties took steps for substitution of the deceased JDrs. Petitioners being substituted came to know that application under Section 47 CPC filed by their predecessors had already been dismissed for default of the JDrs. Hence, an application in CMA No.10 of 2022 was filed for restoration of CMA No.8 of 2009. Learned executing Court dismissed the said application holding that CMA No.8 of 2009 filed under Section 47 CPC was grossly time barred. Hence, no fruitful purpose will be served by restoring the same after a lapse of so many years.

**5.1** Mr. Rout, learned counsel for the Petitioners further submits that Article 137 of the Limitation Act is not applicable to a proceeding under Section 47 CPC, as observed by learned executing Court. There is no provision either in CPC or in the Limitation Act prescribing time limit for filing of an application under Section 47 CPC. The petition under Section 47 CPC in CMA No.8 of 2009 was dismissed for default, which was beyond the control of the Petitioners. Thus, the Petitioners who have stepped into the shoes of JDrs. should not be prevented from raising an objection with regard to executability of the decree. The scope of Section 47 CPC is very wide and all the issues which could have been raised by filing a separate suit can be



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raised in a petition under Section 47 CPC. Thus, learned executing Court should not have rejected the petition casually without delving into the merit of the said petition. Hence, he prays for setting aside the impugned order and to direct learned executing Court to adjudicate CMA No.8 of 2009 on merit.

6. Mr. Mohanty, learned counsel for DHrs./Opposite Parties submits that Limitation Act is applicable to execution proceedings. However, Section 5 of the Limitation Act has no application to an execution proceeding. The extension of statutory period for filing of an application in an execution proceeding is ousted only to see that DHrs. enjoy the fruit of the decree. Admittedly, JDrs. appeared in the execution proceeding on 15<sup>th</sup> October, 2001 and they filed CMA No.8 of 2009 under Section 47 CPC on 16<sup>th</sup> March, 2009, i.e., after a lapse of more than seven years from the date of their appearance. Learned executing Court while adjudicating the matter, has also relied upon a decision in the case of **Rasomay Mitra Vs. Smt. Lachmi Todi**, reported in AIR 1982 Cal 178, wherein it is held as under :-

*“With due respect to their Lordships of the Allahabad High Court I am of the view that it is obligatory on my part to follow the Division Bench decision of this Court. Accordingly, agreeing with the learned trial Judge, I would hold that Article 137 of the Limitation Act would govern an application under Section 47 of the Civil P.C. This application on the ground of limitation, therefore, was rightly rejected.”*

In the said case law, it is held that Article 137 of the Limitation Act governs an application under Section 47 CPC, which is only



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three years from the date the right to file such petition accrues, i.e., the date of appearance of the JDrs. Since the application filed under Section 47 CPC has already been dismissed since 1<sup>st</sup> August, 2022 for default of the JDrs., no purpose would be served by restoring the said application, when the said application was itself, time barred. He, therefore, submits that learned executing Court has committed no error in dismissing CMA No.10 of 2022 filed with a prayer to restore CMA No.8 of 2009.

7. Taking note of the submissions made by learned counsel for the parties and on perusal of record, it appears that the application under Section 47 CPC was filed on 16<sup>th</sup> March, 2009, whereas the JDrs. had entered appearance in the execution case on 15<sup>th</sup> October, 2001. In the case of *Rasomay Mitra (supra)*, the Calcutta High Court categorically held that an application under Section 47 CPC is governed under Article 137 of the Limitation Act. Thus, the period of limitation for filing of petition under Section 47 CPC is three years from the date of appearance of the JDrs., i.e., on 15<sup>th</sup> October, 2001, but the same was filed on 16<sup>th</sup> March, 2009, i.e., after more than seven years. When a separate suit challenging the decree would be barred by limitation, a petition under Section 47 CPC will certainly be not maintainable. Thus, learned executing Court has rightly held that no purpose will be served by restoring the application under Section 47 CPC (CMA No.8 of 2009), which was hopelessly time barred.



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8. The Petitioners have only stepped into the shoes of the JDrs. Thus, they are bound by the decree to be executed as well as the legal action taken by their predecessors. As such, learned executing Court has committed no error in rejecting CMA No.10 of 2022 filed for restoration of CMA No.8 of 2009 under Section 47 CPC.

9. Accordingly, the CMP sans merit and is dismissed.

10. Interim order dated 26<sup>th</sup> October, 2022 passed in IA No.1123 of 2022 stands vacated.

Issue urgent certified copy of the order on proper application.

**(K.R. Mohapatra)**  
**Judge**

*s.s.satapathy*