

24.11.2018

Presence : None for the plaintiff.
Sh. Tejas Parashar, Counsel for the defendants

ORDER

1. This order shall dispose off application of the defendants under Order VII Rule 11 CPC.

2. The defendants moved this application *inter alia* praying that the instant suit is not maintainable being barred by the limitation by virtue of Article 72 of the Limitation Act. The defendants after reproducing certain paragraphs of the plaint contended that surgery was performed on the plaintiff on 23.08.2013 when the cause of action arose but the present suit was filed on 22.08.2015 beyond a period of one year prescribed in the above mentioned Article 72, thus barred by limitation.

3. The plaintiff did not file any formal reply to the application but filed written submissions contending that the case is not covered under Article 72 because the said Article applies only in the cases when the negligence has occurred while performing acts in pursuance of any enactment in force. It is contended that the gamut of this section is restricted to actions under the statute. A reliance was placed upon State of A.P. v. Challa Ramakrishna Reddy AIR 2000 SC

2083. It was further submitted that this case was covered under Article 113 of Limitation Act which provides a period of three years and hence the suit is within the time.

4. Briefly stated facts of the case as emanate from the plaint are that the plaintiff underwent mamography on 20.07.2013 wherein she was diagnosed with dilated duct in the left breast positioned at 7'o Clock. This was followed by FNAC of the area confirming the finding of medical condition. On 13.08.2013, the plaintiff consulted the defendant no. 1 and at his advice undergone a round of MRI & biopsy. These reports indicated additional findings of clumped nodular mass enhancement at a 12'o Clock position of her left breast. The plaintiff underwent surgery on 23.08.2013 and it is claimed that in this surgery the defendant no. 1 dealt with area at 12'o clock position which in the contention of the plaintiff was not required to be intervened whereas the defendant no. 1 left the other area at 7'o clock was negligently left unprotected. This necessitated further investigation on 02.08.2014 and eventually second surgery was done on 28.09.2014.

5. The rival contentions have been considered in the light of the legal proposition that question of limitation is a mixed question of fact and law. At this stage, the contents of the plaint are to be read which brings out that alleged negligence of the defendant would get covered under Article 113 prescribing a period of three years. The contention that Article 72 would not apply because the act of the defendants were not under a statute within the meaning of Article 72. The claim of the plaintiff is tortious in nature and a perusal of Article

72 shows that it is directed to afford protection to the persons acting in pursuance of an enactment. It transpires that this reduced period of limitation could apply only in the cases when the claims are against the actions intended to have been done under the authority of any law and by same reasons these acts are either not justified nor defensible, the period of limitation of one year would apply only in such circumstances (Popatlal Gokuldas Shah & anr v. Ahmedabad Municipal Corporation AIR 2003 Guj 44). In the instant case, the evidence would be required to determine as to under which statute the defendants claimed to have been acting so as to entitle them the benefit of period of limitation of one year.

6. For the reasons above-stated, the application under Order VII Rule 11 CPC is declined.

Put up for completion of pleadings, admission-denial of documents and settlement of issues for **08.01.2019**. Parties are directed to appear in person with original documents or at liberty to file affidavit with regard to admission-denial of documents.

(Vineeta Goyal)
Additional District Judge-03
South District: Saket: New Delhi
24.11.2018