IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND,MEGHALAYA, MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)

SHILLONG BENCH

Civil Revision Petition No. 20(SH) of 2012.

Shri. Dilip Singhania,
S/o (L) T. Singhania
R/o Police Bazar, Thana Road
Shillong **PETITIONER**

- **Versus –**

Shri. Basant Singhania,
S/o (L) Tikaram Singhania
R/o Thana Road, Shillong R**ESPONDENT**

BEFORE
THE HON'BLE MR JUSTICE T VAIPHEI

Advocate for the Petitioner	:Mrs. PDB Buruh :Ms. Pinky Das :Ms. S. Acharjee
Advocate for the Respondent	:Mr. B. Bhattacharjee :Mr. S. Lenthang
Date of Hearing	: 1.10.12
Date of Judgment and Order	: 31-10-2012

JUDGMENT AND ORDER

This civil revision is a typical example of bad drafting, which is becoming more and more frequent and pronounced in these days: the Court is sometimes left to struggle by itself to ascertain the wish of the petitioner or to imagine by itself his case: the valuable time of this Court could have been avoided had little attention been paid to it at the drafting and editing stage. This petition runs into as many as 13 pages with 27 paragraphs with numerous but unnecessary and repetitive facts pleaded therein

and, that too, without chronological order: some extra efforts or proper application of mind and proper editing could have easily enabled the petitioner to compress all the relevant facts in hardly eight pages with some 15 paragraphs or so. It is, to say the least, irritating. Ordinarily, the easiest thing to be done by this Court in such a case is to dismiss the petition on the ground of incoherence, ambiguity and beyond one's grasp. Pleadings are required to be drafted in a simple, coherent and grammatically correct English, that too, in a chronological order as well as comprehensible manner, and should also be precise, comprehensive and to the point. But then, this Court, situated as it is, can hardly shirk its responsibility and wash off its hand by dismissing the petition no matter how bad the drafting is: after all, it is the innocent litigant, who is to suffer because of such inadequacy. I am constrained to say so with the hope that there can be some improvement in future. Against this unhappy prologue, let me try to understand what the petitioner wants and dispose of the case to the best of my ability in accordance with law.

2. The petitioner is principally aggrieved by four orders passed by the trial court. Before proceeding further, a brief narration of the history of the case may be in order. The case apparently originated from a family dispute over inheritance of joint family properties left behind by their predecessors-in-interest. Title Suit No. 37(H) of 2005 was instituted by the petitioner against the respondent before the learned Munsiff/Shillong "for protecting of his interest over the passage and for restraining the respondent and others from using the said passage of land." The respondent contested the suit. The learned Munsiff by the order dated 7-11-

2005 in Misc. Case No. 44(H) of 2005 issued an interim injunction to restrain the respondent from interfering with the use of the suit land by the petitioner pending disposal of the main suit. Subsequently, the respondent, according to the petitioner, as an after-thought and with a *mala fide* intention and to frustrate his suit and harass him, instituted T.S. Suit No. 22(SH) of 2005 before the learned Assistant District Judge, Shillong concerning the matter directly and substantially in issue in the earlier case instituted by him against the same respondent. The respondent simultaneously filed an application under Order 39, Rule 1/2 CPC being Misc. Case No. 34(H) of 2005 and obtained an *ex-parte* interim injunction against the petitioner. This was challenged by the petitioner before the learned Additional District Judge, Shillong, which by the order dated 17-2-2006, after calling for the records and after hearing the parties, settled the miscellaneous case on compromise by directing that only members of the families of the two parties should and could use the passage till disposal of the main suit.

3. It appears that the petitioner subsequently complained of violation of the order of the learned Additional District Judge, Shillong by the respondent by allowing commercial use of the passage in question. Be that as it may, the suit was remanded the appellate court to the trial court for further proceedings. Notice was issued to both the parties fixing 15-3-2006 for written statement. On 31-3-2006, when the petitioner did not file his written statement, the Court ordered that the suit should be proceeded ex-parte. After a delay of almost two years, the petitioner filed an application before the trial court for setting aside

the ex-parte order dated 31-3-2006 together with an application for condonation of delay in filing the application, which are registered as Misc. Case No. 17(H) of 2008 and Misc. Case No. 18(H) of 2008 respectively. The trial court allowed by the order dated 22-7-2008 condoned the delay, which was immediately challenged by the respondent by filing a review application being Misc. Case No. 48(H) of 2008, which was, however, rejected by the trial court by her order dated 3-9-2009. This was challenged by the respondent before this court in ***Civil Revision No. 55(SH) of 2009***, and this Court by the judgment and order dated 30-5-2011 set aside both the orders condoning the delay and the setting aside of the ex-parte. It may, however, be noted that the trial court, notwithstanding the ex parte order, by the order dated 5-7-2011 allowed the petitioner to take part in the proceedings of the suit for cross-examination of the witnesses of the respondent.

4. It may at this stage be noted that, on 22-3-2006, the petitioner had filed an application under Section 10 CPC before the learned Assistant District Judge, Shillong for staying T.S. No. 22(H) of 2005 on the ground that the matter in issue in the suit was directly and substantially in issue in the previous suit of T.S. No. 37(H) of 2005 filed by him before the learned Munsiff/Shillong. The case was registered as Misc. Case No. 22(H) of 2006 whereupon notice was issued by the Court upon the respondent, who contested the application. However, the Presiding Officer of the Court of the Assistant District Judge, Shillong was not available from 20-4-2006 to 21-12-2006, and the new Presiding Officer, on being empowered to try the case, had passed an order on 21-12-2006 for informing the parties for appearance on 1-3-2007.

However, the order was, according to the petitioner, subsequently changed by overwriting for informing the respondent only, but the Court had, nevertheless, observed in the order dated 26-3-2007 of Misc. Case No. 22(H) of 2006 that the petitioner had entered his appearance and fixed 12-4-2007 for show cause and hearing. According to the petitioner, he never appeared before the learned Assistant District Judge after 20-4-2006 when the Presiding Officer of the Court became unavailable nor did he appear after the new Presiding Officer had assumed the office as no notice was ever issued to him as stated earlier.

5. It is the case of the petitioner that he came to know the existence of the order 20-7-2007 dismissing his application for stay of suit only on 4-8-2011 when he checked the old cause list whereupon he immediately applied for the certified copy of the same. After obtaining the certified copy, he withdrew the case from his previous counsel and engaged a new counsel and thereafter filed ***Civil Revision Petition No. 31(SH) of 2011*** before this Court and obtained the order dated 1-9-2011 in the connected Misc. Application No. 293 of 2011 staying further proceedings of T.S. No. 22(H) of 2005 till the next returnable. However, in the meantime, the learned Assistant District Judge by the order dated 30-8-2011 dismissed the T.S. No. 22(H) of 2005 instituted by the respondent in default of prosecution. When the respondent did not file any application for restoration of the suit for more than nine months, the petitioner, under the impression that the dismissal of the suit had become final, considered the revision petition to have become infructuous withdrew the same with the liberty to file a fresh petition vide the order dated 21-12-2011. However, on 24-5-2012,

the petitioner by chance came across the case record of T.S. No. 22(H) of 2005 in which the case was fixed for evidence. On further inquiry, he came to learn that the suit was restored to file by the learned Assistant District Judge on 3-5-2012 in Misc. Case No. 27(H) of 2012 after condoning a delay of 212 days in Misc. case No. 26(H) of 2012. This was done without hearing him. The learned Assistant District Judge thereafter fixed 24-5-2012 for *ex-parte* examination of witnesses on behalf of the plaintiff/respondent. It is aggrieved by this order that the petitioner is coming back to this Court in this revision petition for appropriate relief.

6. I have carefully gone through the materials on record, and also gave my anxious consideration to the rival submissions advanced by Mrs. PDB Baruah, the learned counsel for the petitioner, and Mr. B. Bhattacharjee, the learned counsel for the respondent. The first point for consideration in this revision is, whether the order dated 3-5-2012 passed by the learned Assistant District Judge, Shillong in Misc. Case No. 27(H) of 2012 condoning a delay of 212 days in filing the connected application for restoring Title Suit No. 22(H) of 2005 can be sustained in law without issuing notice to the petitioner against whom *ex-parte* proceeding had been ordered earlier? There is no dispute that the learned Assistant District Judge by the order dated 20-7-2007 had directed that the suit should be proceeded against the petitioner *ex-parte*. This order along with the order bearing the same date dismissing the application filed by the petitioner for staying of the suit under Section 10 CPC was challenged before this Court in ***Civil Revision No. 31(SH) of 2011*** but before this Court could dispose of the case, Title Suit No. 22(H) of 2005 was dismissed by the learned

Assistant District Judge whereupon the petitioner was allowed to withdraw the revision petition with a liberty to file a fresh petition.

7. It may at this stage be noted that though Title Suit No. 22(H) of 2005, before its dismissal in default, had been directed to be proceeded against the petitioner *ex-parte*, the trial court by the order dated 5-7-2011 allowed "the application of the petitioner for allowing him to take part in the trial of the case by allowing him to cross-examine the witness of the plaintiff (the respondent herein) with a copy for the plaintiff". Thus, it is a matter of record that when the suit was dismissed in default, the petitioner was also taking part in the suit with the permission of the trial court despite the *ex-parte* order against him. After all, he had this limited right to do so. However, as noticed earlier, ***Civil Revision No. 31(SH) of 2011*** was subsequently withdrawn by him with a liberty to file a fresh petition on the dismissal of Title Suit No. 22(H) of 2005 in default.

8. It is also now a matter of record that though Title Suit No. 22(H) of 2005 was dismissed as early as 30-8-2011, but the plaintiff/respondent after a delay of 212 days filed an application for restoration of Title Suit No. 22(H) of 2005. He also separately filed an application for condoning the delay. By the order dated 3-5-2012 passed in Misc. Case No. 27(H) of 2012, the delay was condoned by the trial court. Consequently, the trial court also passed the order dated 3-5-2012 in Misc. Case No. 26(H) of 2012 restoring the suit to file for hearing on merit *ex-parte* against the petitioner. As noted above, the legality of these two orders is called into question in this revision petition under Article 227 of the

Constitution. There is no dispute at the bar, nor can it be disputed, that no notice was issued to the petitioner before passing the two impugned orders. It is the contention of Mr. B. Bhattacharjee, the learned counsel for the plaintiff/respondent, that as the suit had already proceeded against the petitioner *ex-parte* by the time suit was dismissed in default, the trial court correctly exercised her jurisdiction in not issuing notice upon the petitioner. The suit was obviously dismissed by the learned Assistant District Judge under Order 9, Rule 9 of the Code of Civil Procedure, 1908. At this stage, it may not be out of place to reproduce hereunder this provision:

> **"9. Decree against plaintiff by default bars fresh suit.— (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing in a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.**
>
> **2) No order shall be made under this rule unless notice of the application has been served on the opposite party."**

9. As already found by me, this is not a case where the petitioner/defendant had never appeared or having appeared subsequently abandoned the suit altogether. He had contested the suit ever since 3-8-2011 when the trial court allowed him to cross-examine the witnesses of the respondent. It is another matter that his earlier application for setting aside the *ex-parte* order so as to

enable him to contest the suit by filing his written statement was allowed by the trial court by its order dated 22-7-2008 in Misc. Case No. 18(H) of 2008, but this Court by the judgment and order dated 30-5-2011 in ***Civil Revision Petition No. 55(SH) of 2009*** set aside the said order of the trial court. Nevertheless, the undeniable fact in this case is that the trial of the suit had been proceeding against the petitioner *ex-parte*, when the suit was dismissed in default, but he was subsequently allowed to participate in the ex-parte proceeding and had, in fact, started doing so. In ***Puirag Chand v. Channamal, AIR 1988 Raj 201***, where one of the defendants had elected not to participate in the proceeding, the suit was directed to be proceeded with against him *ex-parte*. The suit was, however, dismissed in default of prosecution. When the suit was restored to its original number and was fixed for evidence, it was held that the absentee defendant could not claim any notice for restoration. In my judgment, the facts in that case are clearly distinguishable from the facts of this case, for the simple reason that the petitioner in this case was allowed by the trial court to take part in the ex-parte proceeding, at least, for the purpose of cross-examination of the witnesses of the respondent. The Orissa High Court had already contemplated a situation of this nature as early as 1949 in ***Ratnakar Ray and others v. Kulamoni Roy and others reported in AIR 1951 Orissa 266***. The relevant portion of the judgment is found at paragraph [4] of the report, which are in the following terms:

> *"[4] ..... If the suit had not been set down* ***ex parte*** *against them & if they were going to be bound by the order of restoration that had been passed, I do not understand how any order affecting them could be passed in their absence. Some support is prayed in aid from the absence*

of provisions in terms or the like of sub-rule (2) of R. 9 of the Order from R. 4. But that does not necessarily mean that in any default under O. 9, R. 3, restoration can be had in the absence of the opposite parties. There may be a case where the deft. has not at all appeared or having appeared has not filed any defence. In such cases it is quite possible that the Ct. in its discretion, may say that no notice is necessary to be served upon him in the matter of restoration, as he must be served again after the suit is restored to its file. But what about the case in which the deft. had entered into contest, and had put the pltf. To proof of his case. In these cases the dismissal of the pltf.'s suit, be it under whatever provision of the Code, gives rise to a valuable right in his favour. It is difficult to conceive that they can be deprived of that right without being heard. It may be said even without restoration the pltf. Has a right to fresh suit on the same cause of action. It may be for the purpose of fresh suit lo of moneys is necessary by way of payment of court-fees and the plaintiff may not be able to institute a fresh suit. There is always a slip between cup & lip. Under the circumstances, the right to prevent restoration of the suit is no doubt a valuable right."

10. From the paragraph extracted above, it is obvious that notice under Order 9, Rule 9[2] of the Code cannot always be insisted upon even though the sub-rule says so, more so, when the defendant did not bother to enter his appearance at all in the suit: he cannot later on insist notice when the suit was dismissed for default and was again restored to file. Procedural laws are simply the handmaids of justice and not its mistress. Order 9, Rule 9[2] of the Code is nothing but another device engrafted by the Legislature to introduce the theory of reasonable opportunity and the principles of natural justice to assist a litigant to vindicate his just rights. In the words of JUSTICE SAWANT, they are not incantations to be invoked or rites to be performed on all and sundry occasions. To insist notice under Order 9, Rule 9(2) of the Code before restoring a suit dismissed in default, irrespective of whether the defendant was interested in contesting the suit or whether he had ever entered his appearance earlier, "will amount

to stretching the concept of justice to illogical and exasperating limits" and will result in "unnatural expansion of natural justice" which in itself is antithetical to justice. True, Order 9, Rule 9(2) CPC used the word "shall", but that by itself is not conclusive. In the context of Order 8, Rule 1 CPC, where the word "shall" is also used, the Apex Court in ***Salem Bar Association, v. Union of India, (2005) 6 SCC 344*** reiterates the principles for construction of this word, which, I think, will also be applicable to the controversy under consideration. This is what the Apex court said:

> *"20. The use of the word "shall" in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word "shall" is ordinarily indicative of the nature the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage (of justice?) has to be preferred. The rules of procedure are the handmaids of justice and not its mistress. In the present context, strict interpretation would defeat justice."*

11. In the instant case, the petitioner had not only entered his appearance in the suit, but had also prayed for and was already allowed to take part in the *ex-parte* proceeding for the purpose of cross-examination of the witnesses of the respondent when the suit was dismissed in default of prosecution. But for this distinguishing feature, the contention of Mr. B. Bhattacharjee, the learned counsel for the respondent might have force. Therefore, this is the case in which the petitioner had entered into contest and had put the respondent to proof of his case, which gives rise to valuable right in his favour. To decide otherwise will mean denial of

right of hearing upon the petitioner. In this view of the matter, the impugned orders of the learned Assistant District Judge, Shillong condoning the delay and restoring the suit without giving notice to the petitioner contravene the provision of Order 9, Rule 9(2) of the Code. In the view that I have taken, I have no hesitation to hold that the jurisdiction available to the learned Assistant District Judge under Order 9, Rule 9(2) CPC has not been exercised by her in a manner permitted by that provision thereby occasioning failure of justice: this warrants the invoking by this Court of its supervisory jurisdiction under Article 227 of the Constitution.

12. Coming now to the impugned order dated 20-7-2007 passed in Misc. Case No. 22(H) of 2006, it is seen that by this order, the application of the petitioner under Section 10 CPC for staying of the suit pending before the learned Assistant District Judge, Shillong was dismissed in default of prosecution. Admittedly, the Presiding Officer of the Court was not available from 20-4-2006 to 21-12-2006. When the new Presiding Officer assumed the office on 21-12-2006, he had directed that the parties be informed and fixed 1-3-2007 for report and appearance. From the order dated 26-3-2007 to 20-7-2007, it was recorded that the petitioner had entered his appearance on that day and thereafter on 12-4-07, but was found absent from 1-5-2007 till the application was dismissed in default on 20-7-2007. It is the case of the petitioner that he did not put in his appearance on 26-3-2007 or on 12-4-2007 as recorded by the trial court. The law is now well-settled that statement of facts recorded by Courts in respect of proceedings in Courts is conclusive, and is not open to question in the Supreme Court or the High Court. Moreover, the reason for the delay in filing the

Civil Revision Petition No. 31(SH) of 2011, which was withdrawn by him after T.S. Suit No. 22(H) of 2005 was dismissed in default, is ill-conceived and appears to be based on false and concocted story. Consequently, I am not inclined to interfere with the impugned orders dated 20-7-2007.

13. The result of the foregoing discussion is that this revision is partly allowed. The impugned order dated 3-5-2012 of Misc. Case No. 27(H) of 2012 and the consequential order dated 3-5-2012 of Misc. Case No. 26(H) of 2012 passed by the learned Assistant District Judge, Shillong are hereby set aside. Both Misc. Case No. 27(H) of 2012 and Misc. Case No. 26(H) of 2012 stand restored to the file of the learned Assistant District Judge, who shall now proceed with the cases and dispose of the same in accordance with law. Needless to say, both the parties shall be given opportunity of hearing before disposing of the cases. The impugned order dated 20-7-2007 passed by the learned Assistant District Judge, Shillong in Misc. Case No. 22(H) of 2006 is, however, not interfered with. It is made clear that the petitioner is not precluded from filing a fresh application under Section 10 CPC for staying of T.S. No. 22(H) of 2005, which, if and when filed, shall also be considered by the trial court in accordance with law. Transmit the L.C. records forthwith. No costs.

JUDGE

V. Lyndem