

**THE HIGH COURT OF TRIPURA
A G A R T A L A**

CRP No.15 of 2016

1. Smt. Tapa Deb (Kar),
wife of late Paritosh Kar,
resident of West Joynagar, Dashamighat,
P.O. Agartala, P.S. West Agartala,
District – West Tripura
2. Smt. Abha Deb,
daughter of late Mahipal Deb,
resident of Ramnagar Road No.3,
P.O. Ramnagar, P.S. West Agartala,
District – West Tripura

.....Defendant-Petitioners

– Vs –

1. Smti. Jaba Deb (Lodh),
wife of Shri Kamal Lodh,
resident of Ramnagar Road No.6,
P.O. Ramnagar, P.S. West Agartala, District-West Tripura

.....Plaintiff-Respondent

2. Smti. Chapa Deb (Das),
wife of Shri Narayan Das,
resident of Rabindra Sarani, New Barrackpore,
24 Parganas, West Bengal

.....Defendant-Respondent

**B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA**

Advocate for the petitioners : Mr. A. K. Bhowmik, Sr. Advocate
Mr. R. Datta, Advocate

Advocate for the respondents: Mr. R. Das, Advocate

Date of hearing and delivery : **31.05.2016**
of Judgment & order

Whether fit for reporting : **NO**

JUDGMENT & ORDER (ORAL)

Heard Mr. A. K. Bhowmik, learned senior counsel assisted by Mr. R. Datta, learned counsel appearing for the petitioners as well as Mr. R. Das, learned counsel appearing for the respondents.

02. This is a petition filed under Article 227 of the Constitution of India for questioning the legality of the order dated 09.02.2016 delivered in Misc.(Condonation) No.07 of 2015 by the Civil Judge, Sr. Divn., Court No.1, Agartala, West Tripura. The said proceeding was initiated at the instance of the petitioners herein. The jurisprudential objection as raised by Mr. Das, learned counsel for the respondents as to the maintainability of this petition has not been insisted any further in view of the decision of the apex court in **Bhag Mal alias Ram Bux and others -vs- Munshi (Dead) by Lrs. and others** reported in **(2007)11SCC285** where it has been enunciated unequivocally as under:

"Reliance has also been placed by Mr. Gupta on Mamuda Khateen and Ors. v. Beniyan Bibi and Ors. AIR1976Cal415, wherein it was held that an order rejecting the memorandum of appeal following the rejection of an application under Section 5 of the Limitation Act for condonation of the delay in filing the appeal is not a decree but incidental to an order against which an application in revision under Section 115 of the Code may lie but no appeal under Order 43 Rule 1 of the Code will be maintainable. If the application under Section 5 is rejected, the order rejecting the said application cannot be a decree and, thus, the order rejecting the memorandum of appeal would merely be an incidental order."

03. Admittedly, the respondent No.1 instituted the suit for partition being TS (Partition) No.97 of 2012 in the court of the Civil Judge, Sr. Divn., Court No.1, Agartala, West Tripura. The said suit has been decided *ex parte* by the order dated 04.07.2015 against the defendants No.1 and 2 and a preliminary decree has been passed in the following terms:

"In the result this suit stands decreed on contest."

The parties to this suit are entitled to 1/4th share each over the suit land.

Parties to this suit are to make partition of the suit land according to their share as declared herein above within a period of two months, failing which each party to the suit shall be at liberty to approach this Court to have a Final Decree in accordance with law.

Prepare Preliminary decree accordingly."

[Emphasis added]

04. The basic facts are not disputed. The father of the petitioners and the respondents, namely Mahipal Deb is survived by the petitioners, the respondents and their brother Uday Shankar Deb who died bachelor on 23.03.2011 and thus the petitioners and the respondents became his legal heirs to inherit the property left by him in the ordinary course. There cannot be any amount of doubt that Uday Shankar Deb had equal share over the property, left by Mahipal Deb, by way of inheritance but during his lifetime since the property was not partitioned, his share was not separated from the joint inherited property. Ultimately, out of the discord between the surviving legal heirs, the said suit was instituted for partition of the said property as described in the schedule of the plaint and the preliminary decree was passed.

05. From the para 3 of the judgment dated 04.07.2015, it appears that:

"3. The defendant Nos.1 and 2 having failed to file written statement within the statutory period, the suit was ordered to be run ex parte against them vide order dated 18.05.2013. The defendant No.3 contested the suit and by filing written statement stated to have no objection if the decree, as prayed for be passed."

06. In the aftermath of the said *ex parte* judgment and decree dated 04.07.2015, the petitioners herein filed an application under Order 9, Rule 13 read with Section 151 of the CPC for setting aside the judgment and the preliminary decree dated 04.07.2015 passed in the said suit. But the said application was not within time. As a result, the petitioners filed one petition for condoning the delay of 30 days under Section 5 of the Limitation Act. The said petition was stiffly resisted by the plaintiff. By the impugned order dated 09.02.2016, the Civil Judge, Sr. Divn., West Tripura, Agartala has observed that:

"Upon going through the record of TS(P) 97 of 2012 both the petitioners have entered appearance in the said suit on 09.09.2012 and sought time to file written statement and, thereafter, having not turned up the suit was ordered to run ex parte against them vide order dated 18.3.2013. It, therefore, cannot be said that the decree was passed beyond the knowledge of the petitioners herein."

"Apart from this no explanation has been averred to condone the delay. Hence I find no justified ground to condone the delay as sought for. Accordingly, the application for condoning delay stands rejected."

07. Mr. A. K. Bhowmik, learned senior counsel has submitted that this order suffers from complete non-application of mind as the petitioners in the petition under Section 5 of the Limitation Act has given the causes for such delay, inasmuch as in para 3 of the said petition, the following fact has been pleaded by the petitioner:

"That the petitioners had no knowledge about the said preliminary decree till 12.08.2015. Petitioners applied for certified copy of the decree on 13.08.2015 and certified copy was delivered on 20.08.2015. Thereafter, the petitioners approached the Ld. Counsel who took 26 days time in preparing and filing the petition."

08. The said explanation, to a court may not be so satisfying. The order declaring to proceed *ex parte* was passed long back but Mr. Bhowmik, learned senior counsel has submitted that since a very important aspect was suppressed by the plaintiffs, despite their specific knowledge, the judgment and decree has come in conflict with the judgment and order dated 22.09.2014 delivered in TS (Probate) No.03 of 2014 by the Addl. District Judge, Court No.4, West Tripura, Agartala whereby on the basis of the will and testament dated 20.03.2010 left by Uday Shankar Deb, Uday Shankar's share stood bequeathed to the petitioners. So there was no scope of merging the share of Uday Shankar Deb, since deceased, with the remaining shares. The devolution of the property shall be strictly guided by the will and the last testament, as probated by the said judgment and order dated 22.09.2014.

09. Mr. R. Das, learned counsel appearing for the respondent has submitted that it was the duty of the petitioners who were the defendants No.1 and 2 in the suit, to place the said judgment and order dated 22.09.2014 in the records of evidence. It was not the duty of the plaintiff who claimed the equal share in the joint property which included the property of Uday Shankar Deb since deceased, their deceased brother to bring the said judgment and order on records.

10. Even though this court is not very satisfied with the causes assigned for condonation of delay but having regard to the substantive ends of justice, particularly in view of the judgment and order dated 22.09.2014 delivered in TS (Probate) No.03 of 2014, this

court is of the view that the strict technical approach in the circumstances may frustrate the ends of justice. As a result, it is required that delay as occurred in filing the petition under Order 9, Rule 13 of the CPC read with Section 151 of the CPC be condoned and the said petition filed under Order 9, Rule 13 read with Section 151 of the CPC be heard on merit by the trial court.

11. Accordingly, the impugned order dated 09.02.2016 delivered in Misc. (Condonation) No.07 of 2015 is set aside and quashed. The delay for which the petition under Section 5 of the Limitation Act was filed, is condoned. The trial court shall hear the application filed by the petitioners under Order 9, Rule 13 read with Section 151 of the CPC on merit within a short while.

Accordingly, this petition stands disposed of. There shall be no order as to costs.

JUDGE